JUSTICE OF THE PEACE & LOCAL GOVERNMENT REVIEW

Saturday, May 28, 1955 **Vol. CXIX. No. 22**

Official & Classified Advertisements, etc.

Official Advertisements (Appointments, Tenders, etc.), 2s. 6d. per line and 3s. 6d. per displayed headline. Classified Advertisements, 24 words 6s. (each additional line 1s. 6d.) Box Number, 1s. extra *Latest time for receipt 2 p.m. Wednesday*

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NOTIFICATION OF VACANCIES ORDER, 1952

The engagement of persons answering these advertisements must be made through a Local Office of the Ministry of Labour or a Scheduled Employment Agency if the applicant is a man aged 18-64 or a woman aged 18-59 inclusive unless he or she, or the employment, is excepted from the provisions of the Notification of Vacancies Order, 1952. *Note :* Barristers, Solicitors, Local Government Officers, who are engaged in a professional, administrative or executive capacity, Police Officers and Social Workers are excepted from the provisions of the Order.

HALE URBAN DISTRICT COUNCIL

Appointment of Clerk of the Council

APPLICATIONS are invited from legally qualified persons and others, with suitable local government experience, for the appointment of Clerk of the Council. The salary attaching to the post will be within the scales as recommended by the Joint Negotiating Committee for Town Clerks and District Council Clerks, the commencing salary to be fixed according to the qualifications and experience of the person appointed.

The appointment will be subject to the recommendations in the Memorandum of the Joint Negotiating Committee; the Local Government Superannuation Acts, 1937-53; medical examination; and will be determinable by three months' notice in writing on either side.

Applications, stating age, particulars of experience and qualifications, and giving the names of two persons from whom references may be obtained, must reach the undersigned, in envelopes endorsed " Clerk of the Council," not later than Saturday, June 18, 1955.

Applicants must state whether to their knowledge they are related to any member or chief officer of the Council. Canvassing in any form will disqualify.

N. S. THOMAS,
Clerk of the Council.

Council Offices,
Ashley Road,
Hale, Cheshire.
May 28, 1955.

CARDIGANSHIRE COUNTY COUNCIL

Deputy Clerk of the County Council and Deputy Clerk of the Peace

APPLICATIONS are invited for the above post. The salary will be as follows:

Deputy Clerk of the County Council—£1,040 per annum × £50—£1,240 per annum.

Deputy Clerk of the Peace — £100 per annum.

Application forms and conditions of service may be obtained from me.

Closing date for applications, June 11, 1955.

J. E. R. CARSON,
Clerk of the County Council.

Swyddfa'r Sir,
Marine Terrace,
Aberystwyth.

LANCS. No. 11 COMBINED PROBATION AREA

APPLICATIONS are invited for the appointment of a whole-time Male Probation Officer.

Applicants must not be less than 23 nor more than 40 years of age, except in the case of serving Probation Officers.

The appointment will be subject to the Probation Rules, 1949-54, and the salary in accordance with the prescribed scale.

The successful applicant will be required to pass a medical examination for the purpose of superannuation.

The person appointed will be assigned to Prescot Petty Sessional Division and will be stationed at Prescot.

Applications, giving details of age, experience and present position, together with not more than two recent testimonials, to be sent to the undersigned not later than June 11, 1955.

W. McCULLEY,
Secretary to the Probation Committee.

Town Hall,
St. Helens.

BOROUGH OF BEDFORD

Quarter Sessions and Committee Clerk

APPLICATIONS are invited for the above appointment. Salary scale A.P.T. III commencing according to qualifications and experience. Housing available if required. Applications, stating age, qualifications (experience of Quarter Sessions and Committee work), appointment held (with dates and salaries), to Town Clerk, Town Hall, Bedford, by June 6, 1955.

G. F. SIMMONDS,
Town Clerk.

Town Hall,
Bedford.

METROPOLITAN BOROUGH OF BATTERSEA

ASSISTANT, in Legal Section of Town Clerk's Department required, A.P.T. II (£590—£670). Experience in general municipal legal work, including conveyancing, desirable. Particulars and application form from Town Clerk, Town Hall, Battersea, S.W.11. Closing date June 13, 1955.

COUNTY OF LEICESTER

Appointment of Clerk to the Justices for the Ashby Division

APPLICATIONS are invited from persons qualified under s. 20 of the Justices of the Peace Act, 1949, for the full-time appointment of Clerk to the Justices for the Petty Sessional Division of Ashby-de-la-Zouch. Salary £1,250 × £50—£1,500. Conditions of service will be those agreed by the Joint Negotiating Committee for Justices' Clerks. Office accommodation and clerical assistance will be provided in Ashby-de-la-Zouch or Coalville.

Applications, giving full details of qualifications and experience and the names of two referees, should reach me not later than June 27, 1955.

JOHN A. CHATTERTON,
Clerk of the Magistrates' Courts Committee.

County Offices,
Grey Friars,
Leicester.

BOROUGH OF CHESTERFIELD

APPLICATIONS are invited from persons experienced in Conveyancing and general legal work for post of Legal Assistant in the Town Clerk's Office. Grade A.P.T. II (£560—£640), commencing salary in accordance with experience and qualifications. Applications, stating age, qualifications and experience, with names and addresses of two referees, to reach the undersigned by June 17, 1955.

Canvassing disqualifies.

RICHARD CLEGG,
Town Clerk.

Town Hall,
Chesterfield.

COUNTY OF DENBIGH

Magistrates' Courts Committee

APPLICATIONS are invited for the appointment of full-time assistant to the Justices' Clerk for the Petty Sessional Division of Colwyn Bay. A good knowledge of magisterial work is necessary. The salary will be between £400 and £550, according to experience. The salary may be subject to adjustment in the event of national salary scales being formulated. Applications, stating age, present appointment and salary, experience, and the names and addresses of two referees, must reach me not later than June 14, 1955. The post is superannuable and is subject to two months' notice and to satisfactory medical examination.

W. E. BUFTON,
Clerk to the Committee.

County Offices,
Ruthin.

APPOINTMENTS

SECRETARY-SHORTHAND-TYPIST, with supervising ability, at a Criminal Court (establishment on satisfactory service). Salary according to age and qualifications. Apply Clerk of the Peace, 181, Marylebone Road, N.W.1.

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Justice of the Peace and LOCAL GOVERNMENT REVIEW

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REPORTS

NOTES OF THE WEEK

Juveniles and Publicity

The general prohibition, contained in s. 49 of the Children and Young Persons Act, against the publication of name, address, school or other particulars about a juvenile appearing in a juvenile court does not apply to other courts, but we notice that it is quite common for reports of cases concerning juveniles to contain no such particulars. This is a merciful and understanding attitude on the part of editors. Sometimes there is good reason for full publicity, in the interests of justice, and it is to be remembered that even the strict prohibition in s. 49 may be relaxed by the Secretary of State or the court. In general, however, we think the press exercises a wise discretion in deciding when to give publicity and when not to do so, in those cases where there is nothing unlawful in printing name, address or other identifying particulars about juveniles.

Recently, we read an account in a local paper, with prominent headlines, of a case concerning a girl of 16 which came before an appeal committee of quarter sessions. The girl had been brought before a juvenile court as in need of care or protection, moral danger being alleged. The juvenile court made an approved school order, and on appeal a supervision order was substituted. The appeal proceedings could, of course, be reported without restriction on the publication of name and address. These particulars were in fact given, together with details of the facts that constituted the alleged moral danger. What the girl was said to have been doing, and the company which she kept were described. As the name and address of the girl were given, the report may well have caused much pain to the parents, to say nothing of the girl's own feelings. There would almost inevitably be talk among neighbours and work-mates, and the position of the family must be difficult.

The Effects

The press fulfils its duty to the public by reporting fairly and accurately such proceedings in the courts as are of public interest or importance. It is right that the public should learn from the newspapers how the courts deal with young people, whether offenders or in need of care or protection. The result of an appeal is also a matter of interest to be reported. What we suggest the public does not need is the story in full detail about a girl who has been foolish and has got into the hands of the court for her folly and perhaps her immorality. Still less does it appear necessary to give her name and address, or to call special attention to the case by large headlines. The result must be to cause pain and anxiety to her parents, and, we should suppose, to make it more difficult for the girl herself in recovering her self-respect and making a fresh start. We cannot speak for the probation officer, but we should be surprised if she did not find this publicizing of the story something of a handicap in her task of dealing with the girl. Surely, if the newspapers (for we understand the story appeared in several) had realized the possible effects of publishing so much, they would have stated the facts in less detail and without giving name and address. The subject is one which might perhaps be considered by the Press Council as a matter upon which some policy could be generally adopted. We are against any unnecessary compulsion in relation to the press, and much prefer voluntary action on its part, because we believe in freedom of speech and writing. We ask those concerned to exercise a kindly discretion, such as most of them do already.

Palm Prints as Evidence

It is by now widely known that no two persons have ever been found to have identical finger-print impressions, and that identification by means of those impressions is considered an infallible kind of evidence in the hands of experts. In countries where people go barefoot, footprints also provide a source of evidence of identity, and in this country shoe marks have sometimes been an aid to detection, although their use must be somewhat limited in these days of mass production of shoes that make the same impression, at all events until they have been in wear for some time.

The Court of Criminal Appeal heard a case (*R.* v. *Robinson, The Times*, May 10), in which evidence of palm prints had formed an essential part of the evidence

in a prosecution for murder. In delivering the judgment of the Court, dismissing the appeal, the Lord Chief Justice referred to the introduction of finger-print evidence into this country by Sir Edward Henry, and its reliability. He went on to say that just as no two persons had identical finger-prints, so also no two had identical palm prints. In the case before the Court there was evidence of a palm print belonging to the murderer and this was said to be the same as that of the appellant. There was other evidence, but the palm-print evidence was the essential part. A senior officer from the finger-print department was able to call the attention of the jury to the points of similarity between the palm prints, and if the jury believed his evidence they were entitled to return a verdict of guilty.

Adoption: Abandonment of the Infant

A consent to an adoption can be withdrawn up to the time of the order, *Re Hollyman* [1945] 1 All E.R. 290; 109 J.P. 95. This was not disputed in the case of *W.* v. *N.* (*The Times*, May 7), where the effect of withdrawal was considered by the Divisional Court.

The facts were unusual. It appeared that the mother of an illegitimate child had in 1952 given her consent to a proposed adoption, believing that it was final and realizing the effect of an adoption order. The applicants did not go on with that application, as they removed to another county, and it was not until 1954 that they made a fresh application to a juvenile court. The mother then refused her consent, and the justices, holding that her consent was necessary and not unreasonably withheld, declined to make an order. Their decision was upheld.

The important question was whether the mother had abandoned her child, so that her consent could be dispensed with on that ground. She had made no attempt to recover possession of the child and had allowed the applicants to retain the care of it, the applicants being at the expense of maintaining it. It was suggested that this was abandonment. The Lord Chief Justice in his judgment, in which the other judges concurred, pointed out that the word "abandoned" in s. 3 of the Adoption Act was used in conjunction with the words "neglected or persistently ill-treated," and compared it with its use in relation to criminal offences, to which it must be likened. Here the mother had not left the child to its fate, but in the hands of people in whom she had confidence, who wished to adopt it, and who were looking after it. If the applicants had handed the child back to the mother she would have been bound to receive it and provide for it or be liable to proceedings. She could not divest herself of that liability. On the question whether her consent was unreasonably withheld also, the justices were right in holding that it was not.

The Welfare of the Infant

The Lord Chief Justice drew attention to the difference between adoption and care and custody. In adoption cases the welfare of the infant was not the primary consideration as it was in matters of care and custody. In adoption the infant was made a member of a family and its parent had no further rights in respect of it. In the present case, it was not to be taken that the Court thought it desirable that the child should continue to live in the conditions in which the mother was living, for the Court was certainly not of that opinion.

It is important for justices to remember the distinction between proceedings under other statutes, such as the Guardianship of Infants Acts, for instance, and proceedings under the Adoption Act, which was clearly laid down. There is sometimes a temptation to override a parent's refusal to consent to adoption when it seems obvious that an adoption order would be in the interests of the welfare of the infant. It may be possible to secure the welfare of the infant by some other kind of proceedings, but not under the Adoption Act, unless one of the statutory grounds for dispensing with consent is proved.

Mental Defectives and Sexual Offences

Section 56 of the Mental Deficiency Act, 1913, the marginal note of which is "protection of defectives from acts of sexual immorality, procuration, etc.," creates a number of offences relating to carnal knowledge of mental defectives. The basis of the section is no doubt that mental defectives are unable to safeguard themselves to the same extent as normal people and that their consent to acts of indecency should generally be no defence to a charge. When an offence has been committed it must often be difficult to bring it home to the offender because the victim may be unable to give such evidence as would justify prosecution. Whether allegations should always be reported to the police is a matter of policy, and a recent memorandum, H.M. (55) 46 dated May 10, provides guidance on this matter.

A summary of the memorandum has been issued which reads as follows:

"This memorandum amends the procedure to be adopted when a certified mentally defective patient is found to be pregnant or there is reason to think that sexual intercourse has taken place.

1. Memorandum R.H.B. (51) 30; H.M.C. (51) 28 advised that when a certified mental defective is found to be pregnant—or there is reason to think that sexual intercourse has taken place—a report should be submitted to the Board of Control in the first instance and that the local police should not be informed.

2. The Board of Control should continue to be informed; but following consultations with the Secretary of State for the Home Department, the Minister is of opinion that it is desirable that in future such cases should be reported to the police, not necessarily with a view to prosecution but to enable the police in consultation with the medical superintendent to decide what is the best course to take in all the circumstances.

3. Medical superintendents should send reports to the local chief constable even where the offence has been committed in another police area."

Clydeside and Thames Side

In an article at p. 278, *ante*, we spoke of some modern developments in the constitutional position of a member of Parliament. We pointed out what seemed to us two dangers—namely that, even in relation to the affairs of his own constituency, a member might be forced or persuaded into pressing the claims of individual constituents, to the detriment of other people who had equal claims; secondly, that, when he was dealing with matters beyond his own constituency, he might all too easily drift (or even be persuaded) into acting as a contact man for commercial interests. About the time we went to press, the national newspapers resumed publication and, by a coincidence, mentioned two instances of action by members of Parliament which illustrate very neatly the other side of the picture; that is to say activities, outside the narrow field of personal interest, which are particularly within the province of a public representative. The obituary notice of Lord Kirkwood in *The Times* recalled how, amongst other services to Clydeside, he had urged upon the Government the desirability of using the Clydeside yards for one of the new Cunard steamships. It was obviously in the interest of the whole community on Clydeside that this large order should

be given; employed persons not less than employers would benefit thereby. The case is therefore different from some of which we have unhappy knowledge, where members of Parliament have pressed upon Ministers and government departments the claims of individual contractors to receive a share of government contracts, upon the ground that those contractors were personal friends of the member by whom their claims were put forward, or were active party members. It cannot be the duty of a politician who has attained the position of a member of the House of Commons to urge that government contracts should go to his local supporters as such, but it is within the proper field of duty to press the claims of his constituency to receive such contracts, provided always that the placing of the contracts there is in conformity with the national interest—an interest which, it can be freely admitted, includes the desirability of preventing unemployment in the member's constituency as well as elsewhere.

The other case, that came to our notice just after we had gone to press with our article already mentioned, was of a different kind. It related to the duty of a member of Parliament to bring to the notice of the Government, of Parliament, and of the public, matters where the law in his opinion needs amendment upon general grounds. An East London member of Parliament was responsible for an article in one of the London evening papers upon what the headline called "the F. and F. Racket." This, it need hardly be said, is the practice of offering to let unfurnished accommodation upon condition that the incoming tenant will buy from the outgoing tenant or from the landlord a certain amount of furniture and fittings. That this practice is general can be seen by anybody who looks through the advertisement columns of the newspapers; indeed, one can often see advertisements by would-be tenants, offering in so many words to pay a premium. Evidently it is no deterrent that it was made illegal by the Landlord and Tenant (Rent Control) Act, 1949, to require a premium upon the grant, renewal, or continuance, of a tenancy to which the Rent Restrictions Acts apply, and that there is also a provision making it illegal for the outgoing tenant of such a house to require a premium for assigning, apart from some exceptions. If a premium is given and accepted in accordance with the advertisements which specifically mention it, there is an offence committed by the recipient, and we suppose that the person giving the premium could also be convicted for aiding and abetting, but the would-be tenant (in particular) is prepared to take this risk, and the person who receives the premium no doubt finds in most cases that he can do so safely. As regards premiums expressly so-called and money payments which are not disguised, we do not think the law could be strengthened beyond what is already contained in the Act of 1949; the offence is created, and criminal proceedings can be taken. Where the payment is not nakedly illegal, the person who paid money can recover it. Local authorities can prosecute when the facts are brought to their notice: *R.* v. *Marks* (1951) 115 J.P. 708. The "F. and F. racket" (so called) is rather more difficult, and the member of Parliament who referred to it, and in the newspaper commented on facts gathered by him in his own constituency (which is typical of practically every thickly populated area), had no effective remedy to offer. He seemed, indeed, not to recognize how far the law had already gone. It would plainly be impossible to forbid the lessor of premises, or an outgoing tenant, to insist upon the incoming tenant's purchasing landlord's fittings which were on the premises, or tenant's fittings which the outgoing tenant desired to leave behind. Such a prohibition could have no other effect than that of deterring landlords and tenants from making improvements, which would otherwise be made. The case is otherwise in regard to furniture, but we are not sure that (in principle) there is a vital difference. It certainly seems undesirable that a tenant who wishes, for example, to provide a fitted carpet for his sitting room should be deterred from doing so, by the fear that if he gives up the premises he may be unable to sell it to the incoming tenant, and thus be obliged to put it into store or take it with him to new premises where it will not fit. The Act of 1949 did not overlook these everyday matters, and made no attempt to forbid such sales. Section 3 does, however, enact that a sale at more than a reasonable price shall be treated as the taking of a premium, with the penal consequences thereby implied. The only difficulty here, so far as the law itself is concerned, lies with fitted carpets, curtains, and such things, which the person who put them in position naturally values rather highly, and the incoming tenant will naturally wish to depreciate. Section 3 of the Act of 1949 is, however, perfectly adequate, when a person decides to take proceedings, and is in a position to satisfy the court before which proceedings are taken that the price asked from him (and paid by him) was more than reasonable. Moreover, an incoming tenant who is required to buy furniture or fittings is by s. 3 (2) entitled to demand a written statement of the price; any material falsehood in that statement is a punishable offence. On paper, therefore, the incoming tenant is completely protected. In practice, it is obvious from an inspection of the advertisement columns of the newspapers that he is not. The only alteration of the law that occurs to us as likely to be useful would be a provision that, where a tenancy is created on these terms, the lessor or the outgoing tenant must not merely give a written statement of the price, but must produce a written valuation of the furniture or fittings, made by a qualified and independent valuer.

National Corporation for the Care of Old People

The annual report of the National Corporation for the Care of Old People indicates some of the directions in which consideration is being given to helping to improve the position of old people now that the original policy of making substantial grants to homes and clubs has been discontinued. Much of what is suggested in the report follows the lines of modern thought generally now prevailing such as has been put forward by the National Old People's Welfare Committee and the organizations associated with that committee. It is interesting to see that the corporation supports the view which is so often expressed, not only by voluntary bodies but also by those representing the local authorities, that an increase in the quantity and, in some cases, even in the quality of home care services is an essential factor in dealing with the whole problem and that it is one which requires the close integration of all services provided by the hospitals, the local authorities and the voluntary organizations. It is true, as stated in the report, that it is just as important for the various voluntary organizations in an area to work in co-operation and to avoid duplication of effort as it is for the voluntary and statutory bodies to agree what each can do for the benefit of old people. Through the encouragement given by the Ministry of Health to the establishment of local old people's welfare committees, now totalling over 1,200, to undertake the pooling of local resources, much has been done, but the mere setting up of a committee of any kind does not necessarily achieve the results which are desired and it may well be that in some parts of the country

more needs to be done to ensure that these committees fulfil the roles which were suggested for them by the Ministry of Health and in which both voluntary organizations and local authorities are equally concerned. Local health authorities, both county and county borough, are taking an increasing part, particularly through their domestic help services, in helping to care for old people in their homes. In counties this is usually decentralized, so county councils will probably be rather surprised at the suggestion in the report that county boroughs may well be able to provide such help as is required rather more quickly than county councils. On housing, the corporation believe that the demand for places in communal homes and for beds in hospitals could be lessened if more old people were suitably housed. After the war many elderly people were admitted to old people's homes because they were in need of housing. Local authorities can, however, only provide accommodation under part III of the National Assistance Act, either in their homes or in voluntary homes, for those who are in need of care and attention. Clearly it is wrong in principle if old people have to seek admission to a communal home merely because they are badly housed. Re-housing is a matter for the housing authorities and not for the welfare authorities. From the reports we see on old people's homes, however, it is not generally a matter of having to provide for those who are so active that they should be in their own homes, but having to care for frail elderly people who require more care than many of these homes can give.

THE MAGISTRATES' COURTS ACT, 1952

DECISIONS OF THE HIGH COURT

Since the Magistrates' Courts Act, 1952, came into operation on June 1, 1953, there have been a number of decisions of the High Court, which, for convenience of reference, are set out below.

Section 1 (1). Issue of summons.

Where the prosecution applied for a summons for careless driving and the justice refused to issue it, observing that an information for dangerous driving should issue, it was held that the discretion as to what charge should be preferred in a particular case must be left to the prosecutor (*R.* v. *Nuneaton Justices, ex parte Parker* [1954] 3 All E.R. 251; 118 J.P. 524).

Section 1 (2) (b)—" A justice of the peace for a county or borough may issue a summons or warrant under this section . . . (*b*) if it appears to the justice necessary or expedient, with a view to the better administration of justice, that the person charged should be tried jointly with, or in the same place as, some other person who is charged with an offence, and who is in custody, or is being, or is to be proceeded against, within the county or borough."

In *R.* v. *Blandford; R.* v. *Freestone* [1955] 1 All E.R. 681, the appellants were charged with receiving stolen goods, the acts of receiving being in Southampton and Staffordshire. The larceny had been in Montgomeryshire, where two other persons were charged with receiving property stolen from the same owners. It was held that the above section gave the justices in Montgomeryshire jurisdiction to issue summonses to the persons accused of receiving in Southampton and Staffordshire. The Court observed that the section gave the justices a discretion and intimated that in some cases (but not this one) injustice and undue hardship might be caused to the defendant if the procedure allowed by the section were adopted, as distance might make it difficult for him to prepare and present his defence and call witnesses.

Section 4. Proceedings before examining justices.

In *R.* v. *Norfolk Quarter Sessions, ex parte Brunson* [1953] 1 All E.R. 346; 117 J.P. 100, a police inspector applied that an order of *mandamus* should issue to quarter sessions to hear and determine an indictment which had been quashed on the ground that the committal was vitiated because an incompetent witness had given evidence. The order was issued, the Court holding that because justices in taking depositions admit some evidence that is not admissible or hear a witness to whom objection could be taken, the committal is not vitiated.

In *Card* v. *Salmon* [1953] 1 All E.R. 324; 117 J.P. 110, the Queen's Bench Division decided that examining justices have no power to state a case; a case can only be stated by justices sitting as a court of summary jurisdiction.

Section 13 (1)—" On the summary trial of an information, the court shall, if the accused appears, state to him the substance of the information and ask him whether he pleads guilty or not guilty."

The Court of Criminal Appeal has held that where an indictment contains several counts, each count must be put to the prisoner separately and he must be asked to plead to each particular count (*R.* v. *Boyle* (1954) 118 J.P. 481; 3 W.L.R. 364). This principle is, it is submitted, applicable to the summary trials of informations.

In the case of *R.* v. *Campbell, ex parte Hoy* [1953] 1 All E.R. 684; 117 J.P. 189, the defendant had pleaded guilty to an information after careful explanation of the charge by the clerk and was sentenced to imprisonment. Later in the same day a solicitor appeared on defendant's behalf and asked for a plea of not guilty to be substituted. The magistrate agreed and remanded the defendant to be tried by another magistrate. The Queen's Bench Division held that the magistrate was *functus officio* and had no power to take this course as the defendant had been convicted and sentenced.

Section 19 (4)—" Where the offence with which the accused is charged is triable by quarter sessions, the court shall also explain to him that if he consents to be tried summarily and is convicted by the court he may be committed to quarter sessions under s. 29 of this Act, if the court on obtaining information of his character and antecedents, is of opinion that they are such that greater punishment should be inflicted than the court has power to inflict."

Through inadvertence it was not explained to a defendant that he might be committed to quarter sessions for sentence, and on a motion for leave to apply for an order of *certiorari*, the Queen's Bench Division held in *R.* v. *Newcastle-under-Lyme Justices, ex parte Whitehouse* [1952] 2 All E.R. 531, that the conviction was bad in law because of the irregularity.

Section 25—" (1) Where a person who has attained the age of 14 is charged before a magistrates' court with a summary offence for which he is liable, or would if he were an adult be liable, to be sentenced by the court to imprisonment for a term exceeding three months, he may subject to the provisions of this section, claim to be tried by a jury . . ."

(3)—" A magistrates' court before which a person is charged with a summary offence for which he may claim to be tried by a jury shall before asking him whether he pleads guilty, inform him of his right . . ."

It had been stated in *R.* v. *Quinn, ex parte Halstead* (1943) 107 J.P. 459, that the caution required to be given by this section must be given to the defendant personally and that he himself must make the election. In *R.* v. *Salisbury and Amesbury Justices, ex parte Greatbatch* [1954] 2 All E.R. 326; 118 J.P. 392, the Queen's Bench Division disapproved of this opinion and held that if a defendant's solicitor or counsel elects for summary trial on his behalf and in his presence, that election is binding on him unless he contradicts it at the time. The Court also held that he must be specifically informed of his right of trial by jury and then asked: " Do you wish, instead of being tried summarily, to be tried by a jury?" ; and that it is wrong to ask: " Do you wish to be tried summarily?"

In *R.* v. *Phillips* [1953] 1 All E.R. 968; 117 J.P. 235, the accused elected to be tried by a jury on a charge under s. 9 (1) of the Vehicles (Excise) Act, 1949. At quarter sessions he was indicted under the Perjury Act, 1911, and the High Court held that as quarter sessions only got jurisdiction by reason of the accused having exercised his option under s. 25 it was improper to substitute another charge, and the conviction was quashed.

Section 29—" Where on the summary trial under s. 18 (3) or s. 19 of this Act of an indictable offence triable by quarter sessions a person who is not less than 17 years' old is convicted of the offence, then, if on obtaining information about his character and antecedents, the court is of opinion that they are such that greater punishment should be inflicted for the offence than the court has power to inflict, the court may . . . commit him in custody to quarter sessions for sentence . . ."

A person who wishes to appeal from a sentence of quarter sessions following a committal under this section on the ground that he was wrongly committed cannot appeal to the Court of Criminal Appeal: his remedy is to apply for an order or prohibition directed to quarter sessions to prohibit them from dealing with the case, or for an order of *certiorari* directed to the magistrates' court to bring up the order of commitment to be quashed (*R.* v. *Warren* [1954] 1 All E.R. 597; 118 J.P. 238).

Section 35—" A person who aids, abets, counsels or procures the commission by another person of a summary offence shall be guilty of the like offence . . ."

A prosecution under the Road and Rail Traffic Act, 1933, of a person for aiding and abetting the commission of an offence under that Act led to an appeal to the Queen's Bench Division and it was held (*Davies, Turner & Co., Ltd.* v. *Brodie* [1954] 3 All E.R. 283; 118 J.P. 532), following *Johnson* v. *Youden* [1950] 1 All E.R. 300; 114 J.P. 136, that a person cannot be convicted of aiding and abetting the commission of an offence if he does not know of the essential matters which would constitute the offence. If a person shuts his eyes to the obvious, or perhaps, refrains from making any inquiry where a reasonable man would make inquiry the court can find that he was aiding and abetting.

Section 55—" On the hearing of a complaint, a magistrates' court shall have power in its discretion to make such order as to costs:

(*a*) on making the order for which the complaint is made, to be paid by the defendant to the complainant;

(*b*) on dismissing the complaint, to be paid by the complainant to the defendant as it thinks just and reasonable."

In *R.* v. *Glamorganshire Justices, ex parte Barry Dock Coronation Working Men's Club and Institute* (1955) 119 J.P. 218, the justices dismissed an application to strike a club off the register and ordered it to pay 50 guineas costs. It was held they had no jurisdiction to make this order.

Where an order was made striking a club off the register, and at the same time the manager was fined, the justices ordered the club to pay £100 costs and the manager 20 guineas. The actual cost was said to be 21 guineas. On an application for an order of *certiorari*, the order was quashed, it being held that under the guise of making an order for costs the justices had inflicted what could only have been intended as a penalty (*R.* v. *Highgate Justices, ex parte Petrou* [1954] 1 All E.R. 406; 118 J.P. 151).

A refusal to grant costs to a successful complainant was the subject of *R.* v. *Lancashire Quarter Sessions Appeal Committee, ex parte Huyton-with-Roby Urban District Council* [1954] 3 All E.R. 225; 118 J.P. 526. There the justices made an order under the Public Health Act, 1936, that a person should supply a dustbin, but refused the council costs. The Queen's Bench Division decided that a successful applicant has a legal right to ask for his costs and that the application must be considered by the justices in a judicial manner; unless, in the exercise of their discretion the justices feel bound on proper reasons to refuse costs, he is entitled to them.

Section 61—" Where in any domestic proceedings, or in any proceedings for the enforcement or variation of an order made in domestic proceedings, or in proceedings in any matter of bastardy, it appears to a magistrates' court that any party to the proceedings who is not legally represented is unable effectively to examine or cross-examine a witness, the court shall ascertain from that party what are the matters about which the witness may be able to depose or on which the witness ought to be cross-examined, as the case may be, and shall put, or cause to be put, to the witness such questions in the interests of that party as may appear to the court to be proper."

In *Fox* v. *Fox* [1954] 3 All E.R. 526; 119 J.P. 42, a domestic proceeding, the wife was legally represented, but the husband was not. The Divorce Court held that it was the bounden duty of the court to put the husband's case to the wife (he having put only one question in cross-examination) after he had given evidence which revealed his defence.

In *Marjoram* v. *Marjoram* [1955] 2 All E.R. 1; 119 J.P. 291, another domestic proceeding where the wife was legally represented and the husband was not, the husband's case had been set out in a letter addressed to the clerk. It was held that the matters set out in the letter should have been put to the wife in cross-examination by the court.

That the provisions of this section only arise where either party is unrepresented is illustrated in *Hobby* v. *Hobby* [1954] 2 All E.R. 395; 118 J.P. 331, where the High Court held that since both parties were represented neither was in need of assistance to present his or her case to the court.

Section 64 (2). A warrant of commitment may be issued (for the recovery of arrears due under an affiliation order) . . . (*b*) instead of a warrant of distress.

A member of the American forces formerly had all the privileges and immunities conferred by the Army Act on members of the British home forces, by virtue of para. 2 (3) (*b*) of the United States of America (Visiting Forces) Order, 1942, and execution in respect of liability to maintain an illegitimate child may not issue (*R.* v. *Birkenhead Borough Justices, ex parte Smith* [1954] 1 All E.R. 503; 118 J.P. 203). This decision was nullified,

however, as from June 12, 1954, by the Visiting Forces Act, 1952, and orders for the maintenance of wife or children and affiliation orders are enforceable against members of visiting forces under the general law.

Section 65 (2)—" Where a magistrates' court has power to issue a warrant of commitment under this part of this Act, it may, if it thinks it expedient to do so, fix a term of imprisonment and postpone the issue of the warrant until such time and on such conditions, if any, as the court thinks just."

In *R.* v. *Lower Miskin Justices, ex parte Young* [1953] 1 All E.R. 495; 117 J.P. 166, on a summons by a wife in respect of maintenance arrears, the justices committed the husband, but suspended the order for so long as he paid the weekly amount of the order and a sum in respect of the arrears. This was held to give the husband a beneficial option and did not deprive him of the right to secure a discharge of or release from the committal order by payment of the original debt; he was entitled to appropriate or to have appropriated to the discharge of the original debt all the money paid by him and not merely the sum paid in respect of the arrears over and above the weekly maintenance.

Section 78—" Subject to the provisions of any enactment or rule of law authorizing the reception of unsworn evidence, evidence given before a magistrates' court shall be given on oath."

The unsworn evidence of a child may be received in proceedings for any offence by virtue of s. 38 of the Children and Young Persons Act, 1933, but unsworn evidence may not be received in bastardy or other civil proceedings (*R.* v. *Somerset Quarter Sessions Appeals Committee, ex parte Baker, The Times*, April 30, 1954).

Section 87. Statement of case by magistrates' court.

High Court decisions on stated cases have been concerned with the preparation and form of a case. Rules 61-64 of the Magistrates' Courts Rules, 1952, should also be referred to.

With regard to the form of a case a Practice Note [1954] 2 All E.R. 349, directs that special cases for the use of the court should be prepared on foolscap, and not on brief, paper, as this is more convenient for the court.

Where an information was dismissed the prosecution asked for a case to be stated, and the clerk to the justices asked them to draft it, but did not submit the draft to the respondent. It was held that there was no obligation on the clerk to submit the draft to the respondent, although it was frequently done (*Spicer* v. *Warbey* [1953] 1 All E.R. 284; 117 J.P. 92). In *Cowlishaw* v. *Chalkley* [1955] 1 All E.R. 367; 119 J.P. 171, however, the Lord Chief Justice stated that as a rule it was better practice though it cannot be insisted on, that where justices agree to state a case, if they state it themselves or cause their clerk to draft it, it should be submitted to both parties, and in any case of complication it should be left to the parties themselves to draft the case and submit it to the justices for their consideration.

It had been held in *Hodgson* v. *Lakeman* (1943) 107 J.P. 27, that where an appellant died after a case had been stated and before it was heard the Divisional Court had discretion to allow the executors to proceed with the appeal if they had a legal interest, as *e.g.*, in a fine. The Court of Criminal Appeal has refused to extend this principle where the sentence was one of imprisonment (*R.* v. *Rowe* [1955] 2 All E.R. 234).

Section 102—" (3) The issue or execution of a warrant under this Act for the arrest of a person charged with an offence, or of a search warrant, shall be as effectual on Sunday as on any other day."

Whatever may have been the true interpretation of s. 6 of the Sunday Observance Act, 1677, the above section is now authority for the execution of any search warrant, including one under the Licensing Act, 1953, on a Sunday as well as on any other day (*Magee* v. *Morris* [1954] 2 All E.R. 276; 118 J.P. 360).

Magistrates' Courts Rules, 1952.

Rule 77.—" (1) Every information, summons, warrant or other document laid, issued or made for the purposes of, or in connexion with, any proceedings before a magistrates' court for an offence shall be sufficient if it describes the specific offence with which the accused is charged, or of which he is convicted, in ordinary language avoiding so far as possible the use of technical terms and without necessarily stating all the elements of the offence, and gives such particulars as may be necessary for giving reasonable information of the nature of the charge."

An information alleging that the accused " being an employer of workers to whom the Milk Distributive Wages Council (England and Wales) Wages Regulation Order, 1952, made under the Wages Councils Act, 1945, applies, did unlawfully fail to pay remuneration not less than the statutory minimum G.H.T. to one of the said workers, contrary to s. 11 of the Wages Councils Act, 1945, and the said orders made thereunder," was held to be defective in that it did not give such particulars as were necessary to give the accused reasonable information of the nature of the charge (*Stephenson* v. *Johnson* [1954] 1 All E.R. 369; 118 J.P. 199). It was held that the information should have specified the provision of the order which had been infringed, the nature of the worker's employment, the amount which he had been paid, and the amount which he should have been paid.

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MAKING CRIME PAY

By F. J. O. CODDINGTON, *Stipendiary Magistrate*, 1934–1950

On June 16, 1951, in an article in this journal, I argued on general principles (which I there set out in detail and will not repeat), that the fine was a hit-and-miss punishment which could only be justified when other methods of dealing with the offender were unsuitable. Since my retirement in 1950, I have followed reports of magisterial awards in many courts, and it has seemed to me that the tendency to fine has been steadily increasing.

I always distrust *a priori* arguments, whether based on logic or on "common sense," as against actual experience, and therefore I asked my friend Mr. Owens, the clerk to the justices at Bradford, what was the effect of the fines imposed by his courts. He told me that the tendency was to impose heavy fines to be paid by weekly instalments and that his experience (corroborated by his cashier) was that few of those fined offended again, at any rate, within a short time. Unfortunately he was unable to give me exact statistics, but, with that qualification, his experience does, in general, tend to justify the fine. He suggests that perhaps the weekly payment is a weekly reminder of the fact that crime does not pay when the criminal has to pay. Certainly, that would seem to be about the only kind of re-education or deterrence achieved, apart from the important fact that an offender paying a fine by instalments can be put under the supervision of a probation officer during the period of payment, and to that extent obtains the advantage of coming into contact with one trained to advise and help offenders, and this may be much to the good.

Few theorists on the problem of punishment have paid sufficient attention to the fine and there is little scientific or statistical knowledge about its effect either on the individual or on society as a whole. Yet the fine is used in practice more than any other treatment by magistrates, so that here we have practice perpetually out-running theory.

Let me illustrate that by figures taken from the Bradford chief constable's report for 1954:

The total number of people fined was 3,393, but of these 87 were juveniles convicted of indictable offences (usually thefts), and there were also included a number of juveniles fined for non-indictable offences, so that it is impossible to give the exact number of adults here fined.

In the same period only 85 adults were sent to prison, and only 151 persons were placed under the care of a probation officer, of whom more than 78 were juveniles.

There were also 327 offenders discharged absolutely or conditionally.

To put the matter in another way, including a number of juveniles, 3,936 offenders were dealt with of whom 3,393 were fined and 543 dealt with in other ways. This shows the overwhelming numerical superiority of the fine over every other method of dealing with those found guilty.

One must not forget that there are many offences for which a prison sentence cannot be imposed, but there is hardly one where probation or discharge cannot be awarded where these are appropriate. It must not be supposed that I am suggesting that the majority of people fined ought to be imprisoned. For instance, I have tried many defendants for driving without due care and attention, and in very many cases have come to the conclusion that their bad driving was due to momentary inadvertence or stupidity. I often discharged the defendants conditionally, and I learned that they were apt to complain "Why can't he fine us and get it over, instead of having the thing hanging over us for a year like this?"

Such people would be little affected by a fine, and the conditional discharge was far more effective. I never had any person so treated back before me for breach of their condition.

As to the small number of people sent to prison, by summary courts everywhere, it is, I think, generally known that there has been such an outcry about the over-crowding of our prisons (which, one would think, must be caused mainly by quarter sessions or Assizes), that all over the country there are magistrates who hesitate to send people to prison even when they think that under normal conditions that would be the proper treatment.

I do not attack the imposition of a fine in any one of the Bradford cases. I have no knowledge of the circumstances, and it may be that every one of them was justified up to the hilt. I merely quote these numbers to show the overwhelming theoretical and practical importance of the fine.

These figures of Bradford are, of course, merely examples of similar figures all over England, and I still cannot dissociate my mind entirely from general principles. I wonder whether it is wise to fine people who have given way to malignant or lustful emotions? I try to imagine myself as a strong young or middle-aged manual labourer: I dislike my neighbour, or I quarrel with a man after having drink taken: I give him a couple of black eyes and knock his teeth out, and then get fined £5 for doing so. I should think I had had good value for money. If, instead, I were fined £26 to be paid at 10*s*. a week, I am not quite so sure as to what my reactions would be. I think I should resent the punishment as being, in my eyes, grossly unfair, but on the other hand, as I paid my 10*s*. a week, I should organize my budget accordingly and I should soon find that it made very little difference to me. If I were married, it would be my wife who suffered, as we both would, of course, if I went to prison. Unless the probation officer troubled to knock a little sense into me, I do not think my outlook on life or my respect for the law would be seriously improved. I imagine the same sequence of events if I had satisfied a perverted lust with indecent exposure or assault on a girl.

There are some offences where the imposition of a fine almost amounts to a request to go and do it again in order to earn the fine! For instance, brothel-keeping, or street betting offences. It was stated recently that London prostitutes are regularly accused of accosting, blithely plead guilty and blithely pay about a 20*s*. fine, and then rush out of court to earn it. The writer stated that, if these people were seriously dealt with by the courts, the London "police courts" would be clogged and cluttered up with their cases and would never be able to finish their work. It seemed to me an astonishingly cynical attitude towards taking a toll which could have no redemptive effect. It would be simpler to issue an annual licence, as for a motor car.

For a discussion of this matter containing reference to an unduly savage method of punishment, *see* the recent widely-read novel *Brothers-in-Law*, at p. 146.

As, in my view, the social evil of prostitution is mainly that of the dissemination of venereal disease (indeed, it has been contended that the healthy prostitute, by canalizing the overflow of male sexuality, protects the innocence of her virtuous sister), I used to remand women in custody for medical examination,

and if they proved, as they usually did, to be infected, I did my best to compel them to be medically treated. But that is by the way.

I write this article not in a dogmatic but in a questioning mood. I should like some clear-cut pronouncement as to when fines are suitable and when they are not, for I do feel sure that there are many cases where they are not. And I feel equally sure that there are cases where people ought to be sent to prison and that the failure of the authorities to provide the prison is a matter that should be exposed rather than connived at. I am glad to read that the building of two or three new prisons is on the way. That will be a beginning.

There is quite another aspect of the fine which I suspect may become more serious as time goes on. Just as few theoreticians have realized the numerical importance of the fine so I think few people have appreciated the bulk of the money thus collected. In Bradford last year it amounted to £17,500, no small sum. It is true that fines have in the past gone towards the relief of rates or taxes or other public expenses, but now this aspect of them has become concentrated, so to speak, by the facts that all fines go to the Treasury and that the Treasury pays a very substantial part of the expenses of the courts. I do not suppose that those handling the finances of the courts will ever deliberately interfere with the administration of justice, or that they will ever openly (or perhaps even consciously) equate the fines collected with the expenditure on the running of the court. But it is not difficult to foresee the likelihood that the time is not far distant when the court which collects a large total of fines, as compared with other courts in similar areas, will be " the blue-eyed boy," while another court, which deals in a less remunerative manner with offenders, will find applications for improvements of court premises or of court salaries unaccountably pigeon-holed. It was alleged in a notorious trial the other day that a magistrate, in a tasteless effort at wit, said to the clerk, " I have set a target of £60 for you today, and so far have only collected about £40." This sort of thing may be a jest now but there is considerable danger of it becoming no joke. One can but hope that no clerk will allow financial considerations to influence his advice to the court, and that magistrates will impose punishment with regard, and with regard only, to what is best for the proper purpose—be it reformation, rehabilitation, deterrence, or retribution, or any combination of these—and that they will firmly set their minds against imposing a single fine with any other end in view.

LIABILITY FOR THE COST OF MOVING THE APPARATUS OF PUBLIC UTILITIES IN HIGHWAYS—II

[CONTRIBUTED]

(*Concluded from p.* 334, *ante*)

LIABILITY FOR PAYMENT UNDER THE PUBLIC UTILITIES STREET WORKS ACT, 1950

The Public Utilities Street Works Act, 1950, received the Royal Assent on October 26, 1950. Part II of this Act contains a code which is to have effect where undertakers' apparatus is affected by road, bridge, or transport works. The code in part II of the Act applies to all " authority's works " substantially begun after April 26, 1951, subject to the provisions of any " special legislation " in force at that date dealing with matters such as are contained in the code. " Special legislation " is defined in s. 39 (1) of the Act as " a special enactment, and a public general enactment as incorporated in, or applied by, a special enactment, if incorporated or applied with any modification." The code in part II of the Act comprises ss. 22 and 23 of the Act, and sch. 4.

Section 21 (1) of the Act applies the code in part II of the Act to cases in which undertakers' apparatus in a street, or in controlled land abutting on a street, is affected by—

(*a*) any of the following works executed for road purposes by, or on behalf of, the Minister, a county council, or the council of a borough or urban district, that is to say—
- reconstruction or widening of the street,
- substantial alteration of the level thereof,
- provision, alteration of the position or width, or substantial alteration of the level of a carriageway, footpath, or cycle track in the street,
- provision of a cattle-grid in the street or works ancillary thereto, or
- tunnelling or boring under the street; or

(*b*) replacing, reconstruction or substantial alteration of a bridge which carries or goes over the street, if the street is one for the maintenance or repair of which the Minister or a council mentioned in the preceding paragraph is liable or is one which is under the control or management of a transport authority; or

(*c*) substantial works (other than replacing, reconstruction or substantial alteration of a bridge) required for the purposes of a transport undertaking and executed in property held or used for the purposes of the undertaking which the street crosses or is crossed by, if the street is one such as is mentioned in the last preceding paragraph.

The code applies both to apparatus placed in streets (whether before or after the passing of the Act) in exercise of a power to which s. 1 of the Act applies or over which such power is exercisable, and to apparatus placed in controlled land under the provisions of the Act.

Section 22 of the Act prescribes the circumstances in which undertakers have the right to claim payment for works made necessary by the street authority's works and is to be read in conjunction with s. 21. Section 22 (1) of the Act is the first statutory enactment which has dealt with this matter in general terms, and an understanding of its effect is therefore of fundamental importance in appreciating the rights of the parties in any particular case which arises. The Act, and s. 22 in particular, was designed to get rid of the state of affairs which existed in the *Southwark* case, and to establish " that the broad principle which should determine the incidence of liability for the costs of altering undertakers' apparatus is that they should be borne by the party which initiated the proposal to effect the alteration of the highway which necessitated the removal or alteration of the apparatus and so entailed the cost " (para. 10 of the Report by the Joint Committee of the House of Lords and the House of Commons on The Breaking Up of Streets by Statutory Undertakers, 1939). Section 22 (1) of the Act provides as follows:

" Where in any such case as is mentioned in subsection (1) of the last preceding section the authority's works render necessary for the purposes of the supply or service for which the undertakers' apparatus is used the execution by the undertakers of any undertakers' works or the taking by them of

any other measures, whether consisting of a change in the position of apparatus, of works or measures for the protection of apparatus from damage or for preventing any undue interruption or restriction of the supply or service or of other works or measures, the promoting authority shall pay to the undertakers an amount equal to the cost reasonably incurred by the undertakers of the execution of those works or of the taking of those measures, subject however to the provisions of the next succeeding section."

It is to be noted that s. 22 (1) is dealing with the case where the road works can be done without any interference with the undertakers' apparatus, but the undertakers claim that they will be adversely affected by the road works and therefore intend to remove their apparatus and claim the cost from the street authority. Section 22 (2), on the other hand, deals with the converse case where the presence of the apparatus physically interferes with the due execution of the road works; it enables the promoting authority at their own expense to require the undertakers to execute such works as are necessary for the purposes of the carrying out of the authority's works, subject to the conditions mentioned in the subsection.

Before s. 22 can come into operation it is, however, necessary to ensure that the undertakers' apparatus is affected by one or more of the specified classes of work executed by the promoting authority and, in this connexion, it is to be observed that the word " affected " is not qualified by any such expression as " substantially " or " unduly." Turning again to s. 22 (1), it is submitted that the basic provision of this clause is contained in the words " Where in any such case as is mentioned in subs. (1) of the last preceding section (*i.e.*, where the authority's road works affect undertakers' apparatus) the authority's works render necessary for the purposes of the supply or service for which the undertakers' apparatus is used." The question to be considered in each case is, therefore, whether the promoting authority's works render necessary for the above purposes the execution by the undertakers of any undertakers' works or the taking by them of any other measures.

It is, therefore, considered that s. 22 (1) of the Act should be construed as follows:

" Where . . . the authority's works render necessary for the purposes of the supply or service for which the undertakers' apparatus is used the execution by the undertakers

(*a*) of any undertakers' works, or

(*b*) the taking by them of any other measures, whether consisting (in either case)

(i) of a change in the position of apparatus

(ii) of works or measures for the protection of apparatus from damage or for preventing any undue interruption or restriction of the supply or service, or

(iii) of other works or measures

the promoting authority shall pay . . . "

On this construction, the provisions (i) to (iii) above constitute a group following the words " whether consisting " and are a qualification to (*b*) above. In other words, the broad sweep-up provision of the section is the part which says " render necessary for the purposes of the supply or service for which the undertakers' apparatus is used " and then it gives certain examples of the sort of works or measures that may be necessary, and it indicates, for example, that the works or measures may consist of " works or measures for the protection of apparatus from damage or for preventing any undue interruption or restriction of the supply or service " or they may be " other works or measures." In all cases it is qualified by the basic condition in the subsection, that they must be carried out and be necessary for the purposes of the supply or service for which the undertakers' apparatus is used, but the examples specifically given do not exhaust the grounds on which the works or measures can be shown to be necessary. In the construction of the subsection as previously set out, items (*b*) (i) and (ii) represent words which are given in the subsection by way of example, and are not all-embracing, because of the words at the end in (*b*) (iii), namely —" of other works or measures." The writer does not consider that the subsection is confined to cases only where there is an interruption anticipated while the road works are being carried out, or that the subsection is restricted to any works or measures carried out by undertakers during the period of the execution of the road works. It is considered that the subsection is clearly concerned with future damage to undertakers' apparatus, in order to meet the difficulty that existed in the *Southwark* case, and is also equally applicable to prevent undue interruption which may occur in the future. This view is supported by the definition of " undertakers' works " in s. 1 of the Act which includes " inspecting, maintaining, adjusting, repairing, altering, or renewing apparatus." Whether the promoting authority's works have rendered necessary the execution of undertakers' works as mentioned in the subsection is mainly a question of fact to be decided by the arbitrator. In deciding this aspect of the matter, the arbitrator will doubtless consider whether the undertakers' works are essential to give them the same facilities of access to, and a similar degree of protection for, their apparatus as they enjoyed before the road works were carried out. That being so, the arbitrator will next have to decide the crucial question whether that access and that protection are necessary for the purposes of the undertakers' supply of gas, water, or electricity, as the case may be, and, for example, whether that access is necessary to prevent any undue interruption or restriction of the supply or service for which the undertakers are responsible. With regard to the question of access, the phrase in the section is " for preventing any undue interruption or restriction of the supply or service " and it is suggested that in this context the word " undue " can be interpreted as meaning " excessive." This interpretation of the word is in accordance with the definitions contained in *The Concise Oxford Dictionary; Chambers' English Dictionary; Nuttall's Standard Dictionary of the English Language*, and *The New Standard Dictionary of the English Language*. Undue interruption or restriction is to be judged with due regard to the undertakers' statutory and contractual responsibilities to provide a continuous and uninterrupted supply of their particular commodity to the public and to prevent, as far as reasonably possible, interruptions due to breakdowns of their system. The recognized practice of the statutory undertakers' industry in regard to the provision of safeguards to prevent breakdowns of supply would be a relevant matter for the arbitrator to consider in arriving at his decision. The words in the section " for preventing any undue interruption" are words which, however, do limit the burden which the road authority has to carry. If the word " undue " had been omitted, the road authority would have been saddled with liability for the cost of works necessary for preventing any interruption, which would have been inequitable. It is, therefore, suggested that what the section is intended to do is to allow measures to be taken to prevent interruptions, for a longer period than would be necessary if the undertakers' apparatus were laid in accordance with the best accepted practice. If there is an additional delay because the undertakers' apparatus in its altered position, or altered condition, is not laid in accordance with the best accepted practice, then that would be undue delay because it would be the sort of delay which proper precautions or prudent measures could have reasonably avoided, and this is the test which it is considered should be applied in considering whether there has been undue interruption or restriction under the section. In

other words, an "undue interruption" is an interruption which can be avoided by taking reasonable precautions. It is consequential that the greater the ease of access which undertakers have to their apparatus, the greater is the opportunity for preventing undue interruption, and that any additional reasonable safeguard against interruptions are within the works contemplated by the section. On the other hand, however, as has been previously mentioned, an "undue" interruption or restriction of the supply means an interruption or restriction which is excessive in all the circumstances, including a comparison of the cost of the undertakers' works and/or measures with the degree of risk of an interruption occurring at the point where they are carried out or taken and, therefore, when considering the execution of works necessary for preventing undue interruption of supplies and providing protection for apparatus from damage the undertakers must apply a sensible and practical standard of safeguard and of expenditure. In considering what is an undue interruption it is necessary to consider also what the extent of interruption in terms of time will be, and to measure that against other safeguards which may be contemplated or in existence and then to decide whether, having regard to all realities of the case, including the expense involved, it is reasonable to require consumers to face whatever the hazard may be of that period of interruption.

The word "necessary" in the section is one thing and "ex-extremely desirable" is another and a different thing. The word "necessary" is a great deal stronger than the word "desirable" and, in addition, the word "necessary" is capable of more than one meaning. It may mean practically necessary or it may mean as a physical fact absolutely necessary. A situation could arise where there are two alternative standards of safeguard which could be applied to a particular set of circumstances. One, which involves removing any possible risk by heavy expenditure annually, resulting in removal of any chance of interruption of supply or damage to apparatus; this would give the consumer a very high degree of protection On the other hand, there may be another standard regarded as tolerable which exposes the consumer to an hour or two's delay or possible delay in the unlikely contingency of interruption of supply at the particular point where the road works are carried out and, in these circumstances, it may be perfectly justifiable to accept this lower standard, taking the view that it is reasonable to face that degree of risk.

The use of the word "undue" in the section may indicate that Parliament contemplated the possibility of road authorities' works having the effect of causing an interruption or restriction of supply which is or may be tolerable. Only where it is excessive does the burden of expenditure pass to the prompting authority. The problem is to distinguish between a tolerable interruption or risk of damage and an intolerable interruption or risk. The problem may also be considered from the point of view that the undertakers are entitled to insure against the risk of a breakdown in their system and the consequent failure to maintain a continuous supply. The cost of the works carried out by the undertakers would in these circumstances be regarded as being in the nature of a premium, but this presupposes that there is a reasonable probability of breakdown and that the risk is such that a prudent person would cover it by insurance. The following examples of cases which arise in practice will serve to illustrate the matters which are required to be considered, in determining whether or not undertakers can require the promoting authority to pay for the cost of undertakers' works carried out under the provisions of ss. 21 and 22 of the Public Utilities Street Works Act, 1950:

(1) A road junction is reconstructed and widened by extending the carriageway and setting back the kerb, so as to reduce the width of the footpath and verge and increase the carriageway width at the junction. In addition, the previous tarmacadam surface is replaced by a concrete surface. Undertakers have previously laid apparatus in the footpath (which as a result of the street works will become laid under the carriageway) and have also laid certain apparatus in conduits under the carriageway. The undertakers, in such a case, may claim from the promoting authority the cost of works involved in transferring the apparatus which was previously in the old footpath to the new footpath, and extending the conduits for the length of the extended carriageway between the old and new kerb lines.

(2) The promoting authority decide to carry out the re-surfacing or carpeting of a highway; the carpet coat will be of reasonable thickness but will, of necessity, cover undertakers' apparatus which is required to be at surface level, *e.g.*, stop-taps, valves, inspection chambers and manholes, etc.

(3) The promoting authority install traffic islands or street refuges in the middle of a highway beneath which undertakers' apparatus is laid.

(4) The promoting authority construct a new by-pass road over which undertakers' apparatus is situate in such a position as to require its removal.

It is not suggested that the question of liability under ss. 21 and 22 can be settled, in these or in any other cases, by any kind of formula or ready-made set of questions and answers, because the facts of each particular case vary from others. An arbitrator will base his award on the facts which emerge in a particular case, and therefore the following questions should be considered by those whose duty it is to advise upon liability in such cases as those numbered (1) to (3) above.

(*a*) Is the undertakers' apparatus affected by the promoting authority's works (s. 21)?

(*b*) Will there be a substantial alteration of the level of the street or footpath ?

(*c*) Will there be a reconstruction or widening of the street ?

(*d*) Will the undertakers' means of access to their apparatus be prejudiced? How does the new surface of the carriageway compare with the old, *e.g.*, concrete replacing tarmacadam ?

(*e*) How much longer will it take the undertakers to gain access to their apparatus, *e.g.*, to repair a fault, than it did before the promoting authority's works were carried out ?

(*f*) Will the undertakers' apparatus be exposed to a greater risk of damage by, *e.g.*, vehicular traffic or other undertakers excavating in the vicinity, than was the case before the promoting authority's works were carried out ? Will the amount of cover over the undertakers' apparatus be decreased as a result of the roadworks ? At what depth was the apparatus laid before the roadworks were carried out, and what will be the depth after they are completed ?

(*g*) Have the undertakers an alternative means of supplying their consumers in the event of a breakdown at the place where the promoting authority's works are to be carried out ?

(*h*) What is the relative importance of the function of the undertakers' apparatus at such place ? Does it supply important industrial concerns and government departments, or either of the three Services, Army, Navy, or R.A.F. ?

(*i*) What is the age of the undertakers' apparatus and has it proved prone to faults in the past, and what has been the time taken to repair such faults and the method of carrying out the work?

With regard to the questions to be considered in respect of a case such as that numbered (4) above, it is to be noted that s. 1 (3) of the Public Utilities Street Works Act, 1950, states that the expression "street" includes "any length of land laid out as a way whether it is for the time being formed as a way or not,

irrespective of whether the highway, road or other thing in question is a thoroughfare or not." It seems fairly clear, therefore, that as soon as the proposed by-pass is " laid out as a way " it will come within the above definition of " street," and the provisions of the Act will apply to such of the roadworks therein as fall within the classes specified in s. 21 of the Act and are " rendered necessary " in accordance with s. 22 of the Act. It is also to be observed that the definition of the word " in " in s. 39 of the Act is extremely wide and is as follows:

> " in," in a context referring to works, apparatus or other property in a street, controlled land or other place, includes a reference to works, apparatus or other property under, over, across, along or upon it, and, in a context referring to a sewer, drain or tunnel in a street, includes a reference to one thereunder.

This definition seems wide enough to include apparatus which crosses the proposed by-pass, *e.g.*, overhead electric lines, and therefore subject, as previously mentioned, to the application of ss. 21 and 22 to make the promoting authority liable for the cost of the re-routing of such apparatus or raising the height thereof or such other remedial works or measures as may be necessary, having regard to the circumstances of the particular case. It remains to consider the position of the undertakers *vis-a-vis* the promoting authority in regard to the carrying out of private street works under the powers contained in s. 150 of the Public Health Act, 1875, and the laying out of a street under the new streets procedure set out in ss. 30, 31, and 32 of the Public Health Act, 1925. With regard to the carrying out of private street works, the material parts of s. 150 of the Public Health Act, 1875 are as follows:

> " Where any street within any urban district (not being a highway repairable by the inhabitants at large) or the carriageway footway or any other part of such street is not sewered levelled paved metalled flagged channelled and made good or is not lighted to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting adjoining or abutting on such parts thereof as may require to be sewered levelled paved metalled flagged or channelled, or to be lighted, require them to sewer level pave metal flag channel or make good or to provide proper means for lighting the same within a time to be specified in such notice.
>
> If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners, in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act; or the urban authority may by order declare the expenses so incurred to be private improvement expenses."

Where the frontagers themselves carry out the work of making-up the street which the local authority " require them " to do by the notice mentioned in the section, it is clear that such work cannot be said to be carried out by or on behalf of the local authority and is therefore, in these circumstances, outside the scope of s. 21 of the Public Utilities Street Works Act, 1950. Where, however, the local authority exercise their default powers (and they are the type of local authority mentioned in s. 21 (1) (*a*) of the Public Utilities Street Works Act, 1950), as they invariably do, they cannot be said to be acting as contractors or agents for the frontagers as the Public Utilities Street Works Act, 1950, does not appear to distinguish the different capacities in which a street authority may exercise its powers. Particular reference should be made, in this connexion, to s. 21 (3) of the Public Utilities Street Works Act, 1950, which defines the promoting authority (for the purposes of part II of the Act), in relation to a road alteration, as the council executing the road alteration.

The next point to be considered is whether the work involved in making-up private streets amounts to " works executed for road purposes " within the meaning of s. 21 (1) (*a*) of the Public Utilities Street Works Act, 1950. " Road purposes " are defined by s. 39 to mean " the maintenance of a road, any purpose falling within the definition of improvement of roads in subsection (5) of section eight of the Development and Road Improvement Funds Act, 1909, the provision of a cattle-grid in a road and works ancillary thereto, and the construction of a crossing for vehicles across a footway or the strengthening or adaptation of a footway for use as a crossing for vehicles." Section 8 (5) of the Development and Road Improvement Funds Act, 1909, mentioned in the above definition, is as follows:

> " For the purposes of this part of this Act the expression " improvement of roads " includes the widening of any road, the cutting off the corners of any road where land is required to be purchased for that purpose, the levelling of roads, the treatment of a road for mitigating the nuisance of dust, and the doing of any other work in respect of roads beyond ordinary repairs essential to placing a road in a proper state of repair; and the expression " roads " includes bridges, viaducts, subways (roadferries and footways)."

The definition of a " street " in s. 1 (3) of the Public Utilities Street Works Act, 1950, is very wide and would include most streets in which street works are carried out. This definition is as follows:

> " In this Act the expression " street " means (without prejudice to the provisions of subsection (1) of section thirty-eight of this Act) any length of a highway (other than a waterway), road, lane, footway, alley or passage, any square or court, and any length of land laid out as a way whether it is for the time being formed as a way or not, irrespective of whether the highway, road or other thing in question is a thoroughfare or not."

It is evident that the street works in the particular case under consideration are " works executed for road purposes " and are so executed in " a street." It is therefore necessary to consider which (if any) of the classes of work specified in s. 21 (1) (*a*) of the Public Utilities Street Works Act, 1950, comprises such works. It may be that they amount to the reconstruction of the street or the provision or alteration of the position or width of the footpath or carriageway. Each case must be considered on the facts, particular attention being paid to the specification of the works and their effect on undertakers' apparatus, in accordance with the principles previously mentioned. In cases where frontagers have thrown land into a street under the new streets procedure contained in ss. 30, 31, and 32 of the Public Health Act, 1925, the act of widening the street is clearly that of the owner and not the local authority. The most that the local authority can ever do in these circumstances is to make up the widened street, but this operation is functionally different from widening the street.

The position of the private owner

It remains to consider the position of the private owner whose access to the highway from his premises which front on to the highway is obstructed by the presence of statutory undertakers' apparatus which is laid in the highway. The private owner may be developing a building estate which necessitates the construction of roads giving access to the nearest highway, and the obstruction may be caused by the presence of apparatus at the point where the access road joins that highway. Alternatively, the private owner may have erected a garage on his premises and desire to construct a new or enlarged exit on to the highway,

other words, an "undue interruption" is an interruption which can be avoided by taking reasonable precautions. It is consequential that the greater the ease of access which undertakers have to their apparatus, the greater is the opportunity for preventing undue interruption, and that any additional reasonable safeguard against interruptions are within the works contemplated by the section. On the other hand, however, as has been previously mentioned, an "undue" interruption or restriction of the supply means an interruption or restriction which is excessive in all the circumstances, including a comparison of the cost of the undertakers' works and/or measures with the degree of risk of an interruption occurring at the point where they are carried out or taken and, therefore, when considering the execution of works necessary for preventing undue interruption of supplies and providing protection for apparatus from damage the undertakers must apply a sensible and practical standard of safeguard and of expenditure. In considering what is an undue interruption it is necessary to consider also what the extent of interruption in terms of time will be, and to measure that against other safeguards which may be contemplated or in existence and then to decide whether, having regard to all realities of the case, including the expense involved, it is reasonable to require consumers to face whatever the hazard may be of that period of interruption.

The word "necessary" in the section is one thing and "ex-extremely desirable" is another and a different thing. The word "necessary" is a great deal stronger than the word "desirable" and, in addition, the word "necessary" is capable of more than one meaning. It may mean practically necessary or it may mean as a physical fact absolutely necessary. A situation could arise where there are two alternative standards of safeguard which could be applied to a particular set of circumstances. One, which involves removing any possible risk by heavy expenditure annually, resulting in removal of any chance of interruption of supply or damage to apparatus; this would give the consumer a very high degree of protection On the other hand, there may be another standard regarded as tolerable which exposes the consumer to an hour or two's delay or possible delay in the unlikely contingency of interruption of supply at the particular point where the road works are carried out and, in these circumstances, it may be perfectly justifiable to accept this lower standard, taking the view that it is reasonable to face that degree of risk.

The use of the word "undue" in the section may indicate that Parliament contemplated the possibility of road authorities' works having the effect of causing an interruption or restriction of supply which is or may be tolerable. Only where it is excessive does the burden of expenditure pass to the prompting authority. The problem is to distinguish between a tolerable interruption or risk of damage and an intolerable interruption or risk. The problem may also be considered from the point of view that the undertakers are entitled to insure against the risk of a breakdown in their system and the consequent failure to maintain a continuous supply. The cost of the works carried out by the undertakers would in these circumstances be regarded as being in the nature of a premium, but this presupposes that there is a reasonable probability of breakdown and that the risk is such that a prudent person would cover it by insurance. The following examples of cases which arise in practice will serve to illustrate the matters which are required to be considered, in determining whether or not undertakers can require the promoting authority to pay for the cost of undertakers' works carried out under the provisions of ss. 21 and 22 of the Public Utilities Street Works Act, 1950:

(1) A road junction is reconstructed and widened by extending the carriageway and setting back the kerb, so as to reduce the width of the footpath and verge and increase the carriageway width at the junction. In addition, the previous tarmacadam surface is replaced by a concrete surface. Undertakers have previously laid apparatus in the footpath (which as a result of the street works will become laid under the carriageway) and have also laid certain apparatus in conduits under the carriageway. The undertakers, in such a case, may claim from the promoting authority the cost of works involved in transferring the apparatus which was previously in the old footpath to the new footpath, and extending the conduits for the length of the extended carriageway between the old and new kerb lines.

(2) The promoting authority decide to carry out the re-surfacing or carpeting of a highway; the carpet coat will be of reasonable thickness but will, of necessity, cover undertakers' apparatus which is required to be at surface level, *e.g.*, stop-taps, valves, inspection chambers and manholes, etc.

(3) The promoting authority install traffic islands or street refuges in the middle of a highway beneath which undertakers' apparatus is laid.

(4) The promoting authority construct a new by-pass road over which undertakers' apparatus is situate in such a position as to require its removal.

It is not suggested that the question of liability under ss. 21 and 22 can be settled, in these or in any other cases, by any kind of formula or ready-made set of questions and answers, because the facts of each particular case vary from others. An arbitrator will base his award on the facts which emerge in a particular case, and therefore the following questions should be considered by those whose duty it is to advise upon liability in such cases as those numbered (1) to (3) above.

(*a*) Is the undertakers' apparatus affected by the promoting authority's works (s. 21)?

(*b*) Will there be a substantial alteration of the level of the street or footpath ?

(*c*) Will there be a reconstruction or widening of the street ?

(*d*) Will the undertakers' means of access to their apparatus be prejudiced? How does the new surface of the carriageway compare with the old, *e.g.*, concrete replacing tarmacadam ?

(*e*) How much longer will it take the undertakers to gain access to their apparatus, *e.g.*, to repair a fault, than it did before the promoting authority's works were carried out ?

(*f*) Will the undertakers' apparatus be exposed to a greater risk of damage by, *e.g.*, vehicular traffic or other undertakers excavating in the vicinity, than was the case before the promoting authority's works were carried out ? Will the amount of cover over the undertakers' apparatus be decreased as a result of the roadworks ? At what depth was the apparatus laid before the roadworks were carried out, and what will be the depth after they are completed ?

(*g*) Have the undertakers an alternative means of supplying their consumers in the event of a breakdown at the place where the promoting authority's works are to be carried out ?

(*h*) What is the relative importance of the function of the undertakers' apparatus at such place ? Does it supply important industrial concerns and government departments, or either of the three Services, Army, Navy, or R.A.F. ?

(*i*) What is the age of the undertakers' apparatus and has it proved prone to faults in the past, and what has been the time taken to repair such faults and the method of carrying out the work?

With regard to the questions to be considered in respect of a case such as that numbered (4) above, it is to be noted that s. 1 (3) of the Public Utilities Street Works Act, 1950, states that the expression "street" includes "any length of land laid out as a way whether it is for the time being formed as a way or not,

irrespective of whether the highway, road or other thing in question is a thoroughfare or not." It seems fairly clear, therefore, that as soon as the proposed by-pass is " laid out as a way " it will come within the above definition of " street," and the provisions of the Act will apply to such of the roadworks therein as fall within the classes specified in s. 21 of the Act and are " rendered necessary " in accordance with s. 22 of the Act. It is also to be observed that the definition of the word " in " in s. 39 of the Act is extremely wide and is as follows:

> " in," in a context referring to works, apparatus or other property in a street, controlled land or other place, includes a reference to works, apparatus or other property under, over, across, along or upon it, and, in a context referring to a sewer, drain or tunnel in a street, includes a reference to one thereunder.

This definition seems wide enough to include apparatus which crosses the proposed by-pass, *e.g.*, overhead electric lines, and therefore subject, as previously mentioned, to the application of ss. 21 and 22 to make the promoting authority liable for the cost of the re-routing of such apparatus or raising the height thereof or such other remedial works or measures as may be necessary, having regard to the circumstances of the particular case. It remains to consider the position of the undertakers *vis-a-vis* the promoting authority in regard to the carrying out of private street works under the powers contained in s. 150 of the Public Health Act, 1875, and the laying out of a street under the new streets procedure set out in ss. 30, 31, and 32 of the Public Health Act, 1925. With regard to the carrying out of private street works, the material parts of s. 150 of the Public Health Act, 1875 are as follows:

> " Where any street within any urban district (not being a highway repairable by the inhabitants at large) or the carriageway footway or any other part of such street is not sewered levelled paved metalled flagged channelled and made good or is not lighted to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting adjoining or abutting on such parts thereof as may require to be sewered levelled paved metalled flagged or channelled, or to be lighted, require them to sewer level pave metal flag channel or make good or to provide proper means for lighting the same within a time to be specified in such notice.
>
> If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners, in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act; or the urban authority may by order declare the expenses so incurred to be private improvement expenses."

Where the frontagers themselves carry out the work of making-up the street which the local authority " require them " to do by the notice mentioned in the section, it is clear that such work cannot be said to be carried out by or on behalf of the local authority and is therefore, in these circumstances, outside the scope of s. 21 of the Public Utilities Street Works Act, 1950. Where, however, the local authority exercise their default powers (and they are the type of local authority mentioned in s. 21 (1) (*a*) of the Public Utilities Street Works Act, 1950), as they invariably do, they cannot be said to be acting as contractors or agents for the frontagers as the Public Utilities Street Works Act, 1950, does not appear to distinguish the different capacities in which a street authority may exercise its powers. Particular reference should be made, in this connexion, to s. 21 (3) of the Public Utilities Street Works Act, 1950, which defines the promoting authority (for the purposes of part II of the Act), in relation to a road alteration, as the council executing the road alteration.

The next point to be considered is whether the work involved in making-up private streets amounts to " works executed for road purposes " within the meaning of s. 21 (1) (*a*) of the Public Utilities Street Works Act, 1950. " Road purposes " are defined by s. 39 to mean " the maintenance of a road, any purpose falling within the definition of improvement of roads in subsection (5) of section eight of the Development and Road Improvement Funds Act, 1909, the provision of a cattle-grid in a road and works ancillary thereto, and the construction of a crossing for vehicles across a footway or the strengthening or adaptation of a footway for use as a crossing for vehicles." Section 8 (5) of the Development and Road Improvement Funds Act, 1909, mentioned in the above definition, is as follows:

> " For the purposes of this part of this Act the expression " improvement of roads " includes the widening of any road, the cutting off the corners of any road where land is required to be purchased for that purpose, the levelling of roads, the treatment of a road for mitigating the nuisance of dust, and the doing of any other work in respect of roads beyond ordinary repairs essential to placing a road in a proper state of repair; and the expression " roads " includes bridges, viaducts, subways (roadferries and footways)."

The definition of a " street " in s. 1 (3) of the Public Utilities Street Works Act, 1950, is very wide and would include most streets in which street works are carried out. This definition is as follows:

> " In this Act the expression " street " means (without prejudice to the provisions of subsection (1) of section thirty-eight of this Act) any length of a highway (other than a waterway), road, lane, footway, alley or passage, any square or court, and any length of land laid out as a way whether it is for the time being formed as a way or not, irrespective of whether the highway, road or other thing in question is a thoroughfare or not."

It is evident that the street works in the particular case under consideration are " works executed for road purposes " and are so executed in " a street." It is therefore necessary to consider which (if any) of the classes of work specified in s. 21 (1) (*a*) of the Public Utilities Street Works Act, 1950, comprises such works. It may be that they amount to the reconstruction of the street or the provision or alteration of the position or width of the footpath or carriageway. Each case must be considered on the facts, particular attention being paid to the specification of the works and their effect on undertakers' apparatus, in accordance with the principles previously mentioned. In cases where frontagers have thrown land into a street under the new streets procedure contained in ss. 30, 31, and 32 of the Public Health Act, 1925, the act of widening the street is clearly that of the owner and not the local authority. The most that the local authority can ever do in these circumstances is to make up the widened street, but this operation is functionally different from widening the street.

The position of the private owner

It remains to consider the position of the private owner whose access to the highway from his premises which front on to the highway is obstructed by the presence of statutory undertakers' apparatus which is laid in the highway. The private owner may be developing a building estate which necessitates the construction of roads giving access to the nearest highway, and the obstruction may be caused by the presence of apparatus at the point where the access road joins that highway. Alternatively, the private owner may have erected a garage on his premises and desire to construct a new or enlarged exit on to the highway,

only to find that sewers, gas mains, or electric cables are laid in the footpath at such a level as to require lowering before the footpath can be correspondingly lowered to afford the necessary means of access to the highway. Obviously, the solution to the problem, who is to pay for the cost of removing or lowering the apparatus in these circumstances, is not governed entirely by the provision of any statute. It is necessary to examine the position at common law and, in particular, the type and extent of the statutory powers under which the apparatus is, or was, placed in the highway, in addition to looking at the circumstances of each case in detail. The owner of land adjoining a highway has a right of access to the highway from any part of his land adjoining the highway: *Lyon* v. *Fishmongers Company* (1876) 1 App. Cas. 662; *Tithe Redemption Commission* v. *Runcorn, supra.* In the case of *Geddis* v. *Proprietors of Bann Reservoir* (1878) 3 App. Cas. 430 (which was concerned with the question of liability arising from the erection of a reservoir under statutory powers) Lord Blackburn said at p. 455: "For I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorized, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, 'negligence' not to make such reasonable exercise of their powers." In *Metropolitan Asylum District* v. *Hill* (1881) 6 App. Cas. 193; 45 J.P. 664, the exercise of statutory powers was considered by the House of Lords with reference to infringement of private rights by the creation of a nuisance. This case arose out of the erection of a small-pox hospital under the Metropolitan Poor Act, 1867, in a position which was alleged to constitute a nuisance to the owners of other property in the vicinity. At p. 203 of this report Lord Blackburn said: "The legislature has very often interfered with the rights of private persons, but in modern times it has generally given compensation to those injured; and if no compensation is given it affords a reason, though not a conclusive one, for thinking that the intention of the legislature was, not that the thing should be done at all events, but only that it should be done, if it could be done, without injury to others. What was the intention of the legislature in any particular Act is a question of the construction of the Act." And at pp. 211-213 Lord Watson said: "The judgment of this House in *The Hammersmith Railway Company* v. *Brand* (1868) L.R. 4 H.L. 171; 34 J.P. 36, determines that where Parliament has given express powers to construct certain buildings or works according to plans and specifications, upon a particular site, and for a specific purpose, the use of these works or buildings, in the manner contemplated and sanctioned by the Act, cannot, except in so far as negligent, be restrained by injunction, although such use may constitute a nuisance at common law; and that no compensation is due in respect of injury to private rights, unless the Act provides for such compensation being made. . . . I see no reason to doubt that, wherever it can be shown to be matter of plain and necessary implication from the language of a statute, that the legislature did intend to confer the specific powers above referred to, the result in law will be precisely the same as if these powers had been given in express terms. And I am disposed to hold that if the legislature, without specifying either plan or site, were to prescribe by statute that a public body shall, within certain defined limits, provide hospital accommodation for a class or classes of persons labouring under infectious disease, no injunction could issue against the use of an hospital established in pursuance of the Act, provided that it were either apparent or proved to the satisfaction of the court that the directions of the Act could not be complied with at all without creating a nuisance. In that case, the necessary result of that which they have directed to be done must presumably have been in the view of the legislature at the time when the Act was passed. On the other hand, I do not think that the legislature can be held to have sanctioned that which is a nuisance at common law, except in the case where it has authorized a certain use of a specific building in a specified position, which cannot be so used without occasioning nuisance, or in the case where, the particular plan or locality not being prescribed, it has imperatively directed that a building shall be provided within a certain area and so used, it being an obvious or established fact that nuisance must be the result. In the latter case the onus of proving that the creation of a nuisance will be the inevitable result of carrying out the directions of the legislature lies upon the persons seeking to justify the nuisance. Their justification depends upon their making good these two propositions—in the first place, that such are the imperative orders of the legislature; and in the second place that they cannot possibly obey those orders without infringing private rights. If the order of the legislature can be implemented without nuisance, they cannot, in my opinion, plead the protection of the statute; and, on the other hand, it is insufficient for their protection that what is contemplated by the statute cannot be done without nuisance, unless they are also able to show that the legislature has directed it to be done. Where the terms of the statute are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put into execution or not, I think the fair inference is that the legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer license to commit nuisance in any place which might be selected for the purpose."

In considering this question it is important, therefore, to bear in mind the distinction between absolute and conditional statutory authority. Absolute statutory authority is authority to do the act notwithstanding the fact that the proper exercise of this power may occasion a nuisance: on the other hand, conditional statutory authority is authority to do the act, provided it can be done without causing a nuisance. In *Metropolitan Asylum District* v. *Hill, supra,* it was held that the statutory authority was not an absolute but a conditional authority to do certain things if no nuisance would result, and illustrates the second class of statutory authority mentioned above. The effect of general powers is usually to legalize what would otherwise be a public nuisance, subject to the payment of compensation for damage done to the street. The question in each case is whether those powers can be exercised by the undertakers in such a way as to cause an interference with private rights. In other words, are the powers absolute ? It is submitted that it is not possible to say that the exercise of statutory powers will necessarily involve the possibility of interference with private rights where alternative positions exist in which the apparatus can, or could have been, placed: *Marriage* v. *East Norfolk Rivers Catchment Board* [1949] 2 All E.R. 1021; 114 J.P. 38 (*per* Tucker, L.J., at p. 41): *a fortiori*, where the statutory provisions do not authorize interference with private property without the consent of the owners and occupiers. The right to commit a private nuisance can of course be acquired by prescription, but the defence that a prescriptive right has been acquired cannot be set up unless the nuisance has been in existence for the whole period during which the apparatus has been in a particular place: in other words, time runs from the day when the nuisance began. In the examples mentioned above this would be from the time when the frontager wished to exercise his right of access, and was prevented from so doing by reason of the presence of the apparatus: *Sturgess* v. *Bridgman* (1879) 43 J.P. 76.

LAW AND PENALTIES IN MAGISTERIAL AND OTHER COURTS

No. 40.

OFFENCES UNDER THE FACTORIES ACT, 1937

An old established company carrying on business as bakers was summoned to appear before Bristol magistrates on April 25 last, charged, first, with contravening s. 99 of the Factories Act, 1937, as amended by s. 1 of the Factories Act, 1948. The particulars of the charge alleged that a young person employed at the defendant's factory had remained in that employment for a period exceeding 14 days, that being the period prescribed in the Young Persons (Certificates of Fitness) (Prescribed Period) Order, 1948, without being examined by the appointed factory doctor and certified by him to be fit for that employment.

There was a second charge of a similar nature in regard to another young employee, and the company had also to meet a third charge in that being occupier of the factory and an accident having occurred therein to an employee, it failed to send written notice in the prescribed form required by s. 64 (1) of the Factories Act, 1937, to the inspector for the district.

For the prosecution, it was stated that the company employed about 50 people at the bakery in question, and the offences came to light as a result of an accident to a young female employee who had caught her finger in a machine on November 30 last, as a result of which she had to have hospital treatment. The company failed to report the accident, although it was sent a reminder in December, 1954.

The prosecutor emphasized that it was very important for such accidents to be reported so as to enable inquiry to be made as to whether any offences under the Act had been disclosed, and to ensure that the factory accident statistics compiled annually were correct.

Investigations revealed that neither of the employees mentioned in the first two charges had been medically examined in accordance with the 1948 order, although the former had been employed for six months and the latter nine months. The order, said the prosecutor, if properly complied with, provided a valuable check on the medical suitability or otherwise for young persons entering factory employment.

For the company, who pleaded guilty, it was stated that the facts adduced by the prosecution were admitted. The company had relied upon their personnel manager to carry out these duties. There had been no attempt at subterfuge in relation to the failure to report the accident, for the matter had been reported to the Ministry of National Insurance and Pensions, and the employee had drawn Industrial Injuries Benefit for seven weeks; no one had suffered as a result of the offences. The company baked some eight million loaves of bread each year and owned 24 retail shops. Throughout its long existence it had never been convicted under this or any similar Act.

The company was fined £3 on each of the first two charges and £7 upon the third charge.

COMMENT

Section 99 of the Act of 1937 provides that young persons under the age of 16, who are taken into employment in a factory are not to remain in that employment after the expiration of such period as may be prescribed, unless they have been examined by the examining surgeon and certified by him to be fit for that employment. As stated in the particulars of the charge, the period of time prescribed by order is 14 days and young persons employed must be examined within that time. The section further provides that the examining surgeon may impose conditions in granting a certificate and by subs. (4) a young person is not to be employed except in accordance with such conditions. By subs. (5) the conditions cease to have effect when a young person reaches the age of 16 unless the examining surgeon so directs in the certificate of fitness granted by him, but in any event the condition ceases to have effect when the young person reaches the age of 18.

Section 64 of the Act, it will be recalled, provides that where an accident occurs in a factory which either causes loss of life to an employee or disables an employee for more than three days from earning full wages at the work at which he is employed, a written notice of the accident, in the prescribed form and accompanied by the prescribed particulars is to be sent forthwith to the inspector for the district in which the factory is situated.

The writer has reported this case in some little detail because unfortunately a mistake appeared at p. 288, *ante*, when a report of a penalty imposed by Bristol magistrates' court incorrectly implied that an employer had been convicted of failing to have an employee medically examined after an accident.

(The writer is greatly indebted to Mr. H. G. Crudge, LL.B., who has very recently succeeded Mr. A. J. A. Orme, as clerk to the Bristol justices, for information in regard to this case.) R.L.H.

No. 41.

THE BRAKES ON PEDAL CYCLES REGULATIONS, 1954. A PROSECUTION

A Gas Board pleaded not guilty at the Warrington county magistrates' court on April 6 last to a charge of permitting a gas fitter employed by the board to ride a cycle, the braking system on the front wheel not being in efficient and proper working order, contrary to reg. 5 of the Brakes on Pedal Cycles Regulations, 1954.

For the prosecution, evidence was given by a police officer that on a day in February last he saw the employee riding a pedal cycle belonging to the board, and noticed the front brake was not fitted with brake blocks. He stopped the fitter and tested the rear brake and said that when applied, the cycle could be pushed along quite easily. He spoke to the fitter about the brakes and he replied "I have told my employers but they have no brake blocks in stores." In reply to a question from the solicitor for the board, the police officer said he had spoken to the manager of the board and told him of the offence and of the employee's statement and he replied "As far as I know there are some in stores." The solicitor for the board then submitted that there was no case to answer as there was no evidence of permitting, and referred to the decision of *James & Sons, Ltd.* v. *Smee* (1954) 118 J.P. 536.

The justices rejected this submission and said in their opinion there was a case to answer.

The district service manager then gave evidence on behalf of the board, and said that bicycles were issued to gas fitters and they were to be responsible for the maintenance and repair of them, but any spare parts that were required could be obtained on application to the installation supervisor. He himself was not responsible as a vehicle maintenance engineer. When the pedal cycle regulations came into force, special instructions were given to the gas fitters so that they would be aware of the regulations.

There were brake blocks in stores at this date and they would have been supplied to the fitter on application to the installation supervisor who issued the necessary requisition.

Evidence was also given by the storekeeper and installation supervisor that there were brake blocks in store and there was no record of the fitter having applied for brake blocks. None of the witnesses for the board had examined this cycle prior to the date of the offence.

The justices were of the opinion that the board had committed the offence and a fine of £2 was imposed.

COMMENT

It will be remembered that these regulations which came into operation on September 1 last, lay down the requirements to be complied with as respects the brakes on pedal cycles and tricycles, and authorize the police to test such brakes. Regulation 5 (1) provides that all braking systems are to be efficient and kept in proper working order and by para. (2) of the regulation a braking system is to be deemed to be inefficient if the brake operates directly on the tyre of any wheel.

Regulation 8 provides that a police officer in uniform may test and inspect the brakes of any cycle either on a road or on any premises where the cycle is, but inspection on premises where the cycle is, is only to be carried out if the cycle has been involved in an accident, the test and inspection are carried out within 48 hours of the accident and the owner of the premises consents.

By reg. 7 an offender is liable to a fine of £20.

(The writer is greatly indebted to Mr. Arthur P. V. Pigot, B.A., clerk to the Warrington justices, for information in regard to this case.) R.L.H.

PENALTIES

Birmingham—May, 1955. Stealing four oranges. Fined £10. Defendant, a 36 year old railway goods porter had £243 in his possession and a bank account of £1,400. Defendant's bank account showed monthly deposits of up to £25.

Bullingdon—May, 1955. Camping on a highway for seven consecutive days contrary to s. 72 of the Highway Act, 1835. Two defendants, each fined a total of £1 1*s*.

Oxford—May, 1955. Using a tractor and trailer with the coupling pin in a dangerous condition. Fined £7.

Oxford—May, 1955. Aiding and abetting the above offence. Fined £10. A trailer, carrying a load of 50 *ft*. tree trunks came away from its tractor, overtook it and ran on ahead of it, ultimately

crashing through a garden wall. First defendant was the driver, second defendant the owner. The owner was also fined £2 for using the tractor without an "A" licence and ordered to pay 15*s.* 6*d.* costs.

Stockton-on-Tees—May, 1955. Driving a police car while under the influence of drink. Fined £25, to pay £3 3*s.* costs and disqualified from driving for a year. Defendant, an acting detective-sergeant, whose work exposed him to the danger of drink, was given a first class character by his superintendent.

Middlesex Quarter Sessions—May, 1955. Receiving 17 quartz crystals belonging to his employers. Fined £150. Defendant, a radio tester.

BROUGHT UP ON THE BOTTLE

This is, or should be, the short season during which the sorely-tried inhabitants of this dank and foggy island may reasonably hope to relax for occasional days in the country, or by the sea, without an undue risk of contracting pneumonia, bronchitis, or any of the varieties of catarrhal affections or rheumatic ailments. On Saturdays and Sundays large numbers of family groups set off, by road or rail, along all the escape routes from the larger cities, bound for their chosen strip of countryside or their favourite coastal resort, where they may walk, drive, ride, swim, bask or laze to their hearts' content. Picnic baskets and *al fresco* meals are much in vogue; beer, mineral waters and fruit-drinks are in great demand.

True it is that, in these austere times, a *déjeuner sur l'herbe* seldom attains to the Gargantuan proportions of 100 years or so ago. The meal provided, for example, by Mr. Wardle for his guests at the Rochester Review—when the party was unexpectedly increased by the Pickwickians and Mr. Jingle—included such items as lobster-salad, veal-patty, pigeon-pie, capon and cold tongue, washed down with several bottles of excellent wine; the very catalogue creates a nostalgia for those more ample days. Yet, simpler though our pleasures have perforce become, we still contrive to enjoy our days in the sunshine and the open air—days rendered the more precious by their increasing rarity.

Despite the annual spate of propaganda—of exhortations to "keep Britain tidy"—many of our beauty spots, at the end of a bright summer's day, bear all too openly more than the traces of human occupation. A foreign observer, judging from appearances, might be left uncertain whether he is standing on a site which marks the sacrificial ceremonies of some nameless cult, or a municipal refuse dump which has not quite completed its running-in period. Slovenly and untidy habits are objectionable anywhere; in the heart of the countryside they are unpardonable. A litter of orange-peel, banana-skins, ice-cream cartons and bedraggled paper in the midst of a meadow, or on the summit of the downs, is offensive both to eye and nostril. It is a counsel of perfection to urge people to burn or bury their refuse; either operation requires a combination of favourable climatic conditions which is seldom enjoyed in Britain. They can at least, say the mentors, wrap up the bits and take them home to the domestic dustbin; but this requires a strength of purpose which seldom survives the lassitude that overcomes all but a few chosen spirits after a morning in the open followed by a hearty meal. And so the greasy bags are hurled into the hedge; the cartons perfunctorily thrust behind the bushes; the scraps of food imperfectly concealed among the gorse—until time and the elements, the ministers of slow decay, shall cause them to disintegrate and decently inter their grisly remains.

Disintegration and decay are nature's way with these as with other relics of mortality; but that, unfortunately, is not the whole story. Civilization has provided us with a class of objects that may, for practical purposes, be regarded as indestructible; chief among these is the disused glass bottle, which is extremely difficult, if not impossible, to dispose of in any convenient manner. Even the compilers of *The Thousand and One Nights* seem to have realized this; the fisherman who discovered a sealed bottle caught in his net found it as embarrassing a thing to get rid of as the Djinn which it proved to contain. Nowadays the contents (differently spelt) are all too easily disposed of; but the trouble with the bottle persists. Combustion is impossible; attempts at inhumation in one piece are beset with practical difficulties; breakage is easy, but fraught with danger to life and limb. These peculiarities render a bottle which has outlived its usefulness a most awkward object to have about the place.

It must be rare for these factors to give rise to legal proceedings. In the recent case of *Holloway* v. *London Stadiums, Ltd.*, the location of the trouble was no rural beauty-spot, but one of those enormous arenas where highly-bred, sleek greyhounds display their athletic prowess in pursuing an electrically-propelled prey to the delectation of thousands of spectators, the impoverishment of many pockets, and the enrichment of some few. To this place the plaintiff resorted, over a number of years, on an average of three nights a month. On April 2, 1953, he was leaving his usual place in the 2*s.* 3*d.* stand, for the purpose of collecting his winnings; in descending the steps he trod upon an empty mineral-water bottle (discarded in that unsuitable spot by another *habitué*), and he fell and was injured. He claimed against the defendants (the lessees of the stadium) on the ground that they had failed in their contractual duty to him in permitting the operation of a system whereunder the bottle came to be in so inconvenient and dangerous a situation.

The learned Judge, reviewing the evidence, commended the tidy majority who consumed their refreshment within the *café* and "returned the empties"; and gently deprecated the practice of the minority who preferred to take their drinks back to their places in the stand and discarded the unwanted bottles at the foot of the steps or in other awkward places. But two million persons had been admitted to that very stand in the past 15 years, and no such accident had ever been reported before. In these circumstances, his Lordship held, it was impossible to say that the defendants had failed in their duty. The judgment is chiefly remarkable for the vivid passage in which the Judge remarked that there was perhaps little danger of finding empty ginger-beer bottles in inconvenient corners at Royal Ascot; but in a stadium in the East End of London one must be prepared for a different state of things. "Even if at Rome one did not do as Rome did, if one went sufficiently often to Rome one must be deemed to know what Rome was likely to do." In other words, even if the defendants had been liable, there would have been contributory negligence, on the plaintiff's part, which his lordship assessed at 60 *per cent.* Thus ends an unfortunate episode with a moral which those who run may read—and not only those who run, but also they who serve and they that stand and wait.

A.L.P.

NOTICES

The next general quarter sessions for the city of Hereford will be held on Friday, June 3, 1955, at the Shirehall, Hereford, commencing at 10.30 *a.m.*

PRACTICAL POINTS

All questions for consideration should be addressed to "The Publishers of the Justice of the Peace and Local Government Review, Little London, Chichester, Sussex." The questions of yearly and half-yearly subscribers only are answerable in the Journal. The name and address of the subscriber must accompany each communication. All communications must be typewritten or written on one side of the paper only, and should be in duplicate.

1.—Appeal—*Quarter sessions—Speeches by counsel.*

On an appeal to the quarter sessions appeals committee against conviction and sentence by magistrates for dangerous driving, it was assumed that the proceedings before the committee took the form of a re-hearing of the case as prosecuted and defended before the magistrates. Before the committee, counsel for the respondent opened his case at length and then proceeded to call witnesses who were cross-examined by counsel for the appellant. On the conclusion of the respondent's case, counsel for the appellant informed the committee that he was calling the appellant and one independent witness to give evidence. This he proceeded to do; the appellant and his supporting witness were duly cross-examined by counsel for the respondent. Counsel for the appellant thereupon addressed the committee on the evidence and arguments of fact. He submitted no argument of law.

On the conclusion of counsel for the appellant's address, counsel for the respondent then addressed the committee a second time and at considerable length, reviewing the whole of the evidence. Counsel for the appellant objected and requested that the committee cite their authority for allowing counsel for the respondent to address them a second time, contrary to procedure adopted at the original hearing before the magistrates.

The chairman replied that he quoted no authority but that it was the practice of that particular committee on hearing appeals. It has been ascertained that there are no standing orders governing procedure of the particular appeals committee. The appeal was dismissed.

Was the procedure adopted by the committee in order? And if not, has the appellant any right of redress?

J. DWYRAN.

Answer.

The committee seems to have followed the procedure of a trial on indictment rather than that of a magistrates' court, but as the Magistrates' Courts Act and Rules do not apply we do not think it can be said that the procedure adopted by the committee was incorrect. In the absence of any standing orders it would seem that the committee were entitled to hear counsel in reply.

2.—Charity—*Old People's Welfare Association—Council as trustees.*

The council have received a request from the local Old People's Welfare Association to accept the trusteeship of their properties consisting of freehold and leasehold interests. Do you consider that the activities of the Old People's Welfare Association comes within the definition of a "charity" in s. 268 (3) of the Local Government Act, 1933?

PYHO.

Answer.

Section 268 (3) does not speak merely of charity, but of an ecclesiastical or eleemosynary charity. This is clearly not the former, and we do not think it is the latter, seeing that its objects go beyond the distribution of alms. It follows that the council can become trustees, but subs. (2) must be remembered. Whether the council will be acting wisely in accepting the trusteeship is for consideration.

3.—Hawkers Act, 1888—*Peripatetic dealer selling from motor car—No fixed place for trading.*

Under the provisions of the Minor Licence Duties (Transfer to Local Authorities) Order, 1950, my council were made responsible for the issue of hawkers' licences and the collection of fees payable in respect of the licences. The chief constable has brought to my notice a case in which a person is going from door to door hawking carpets without holding a licence. The difficulty in this case arises from the fact that the hawker is using a motor vehicle to carry the carpets and not using a "horse or other beast" as mentioned in s. 2 of the Act of 1888. It seems clear from the second part of the definition of "hawker" contained in s. 2 that the words "by any locomotion" only have reference to cases in which the hawker has an established place of business. The question however at issue is whether a hawker who uses a motor vehicle comes within the definition contained in s. 2 so as to require him to hold a licence.

POVEN.

Answer.

The definition of a hawker has two branches. The first requires a beast of burden, which this man does not use. The second includes two sub-branches. By the first of these he must travel to a place where he does not usually reside or carry on business. We think the man before us does this. Whatever be the place where he stores his carpets (perhaps it is also his residence), he is trading elsewhere. But this is not enough. Having reached "any place" by a means of locomotion, the second sub-branch of this branch of the section requires that he must also there sell or expose for sale goods, wares, or merchandise in or at a place hired or used by him for that purpose. This man does not hire a place, and the case therefore falls down unless his selling or exposing for sale is "in or at a place used by him for that purpose." The prosecution might thus be confronted with *Eldorado Ice Cream Co.* v. *Clark; The same* v. *Keating* [1938] 1 All E.R. 330; 102 J.P. 147. We discussed that case at 114 J.P.N. 446, pointing out that the Divisional Court had not faced the question whether each piece of ground on which the ice cream barrow halted was a "place." In view of the Scottish decision cited in our article, it might be possible to persuade the Court not to follow the much criticized *Eldorado* case, when dealing with a prosecution under a different Act, but we are bound to call attention to the doubt. The present case may indeed be rather weaker, inasmuch as the Sunday trader need do no more than sell in a place, whereas the hawker must be selling in a place used for the purpose, if he is to be convicted.

4.—Husband and Wife—*Variation of maintenance order—Wife too ill to attend court—Evidence.*

We are acting for a married woman in whose favour, in September, 1953, an order was made against her husband for the sum of £2 10*s*. At the time of the order our client was suffering from tuberculosis under treatment at home. During the period of illness at home she was being "built up" by the medical authorities for a major chest operation, and in November, 1954, she was considered a suitable subject for such operation and was removed to a chest hospital in this district.

During her period at home, our client was in receipt of £1 2*s*. 6*d*. National Insurance in addition to the order against her husband, and on her entry into hospital the National Insurance has been reduced to 9*s*. 6*d*. on the basis, of course, that the difference is received by her in kind (*i.e.*, accommodation, etc.).

The husband has now made an application to the magistrates for a variation of the order requiring reduction in the amount of the weekly payment. The basis of his application, apparently being that her circumstances have altered—by way of improvement—in that she no longer requires so much money to meet her needs, having regard to the fact that she is being provided for in hospital. This contention of course is being resisted.

We are wondering, however, whether the application can, in any case, proceed having regard to the fact that the respondent is not available to give evidence and perhaps you could let us know whether there is any authority for resisting the hearing of the case by the magistrates. The hospital concerned is outside the petty sessional division of the court. It has been suggested that possibly, evidence might be given by our client on affidavit and we shall be glad to have your views generally on this.

TALBOT.

Answer.

It is evidently impossible for the magistrates' court to receive a written statement from the wife in lieu of her oral evidence under the Evidence Act, 1938, as it would be excluded by subs. (3) of s. 1 of that Act.

There is no means of taking her evidence out of court. If she is served with a summons she can appear by counsel or solicitor who can call witnesses on her behalf, but if her evidence is indispensable an adjournment should be applied for so that the wife may attend when she is well enough.

5.—Licensing—*Application for occasional licence or special order of exemption—Petty sessional division where court sits infrequently—Application for event to be held before next ordinary sitting of court.*

I am clerk to a petty sessional division which sits once monthly only on the first Friday of each month. I have within the last day or

two received notice of intention of a licensee to apply for an occasional licence for a farm sale on the 26th instant. The next meeting of my bench is on the 4th *proximo*. I am wondering whether the justices should have a special meeting to consider this application and, if they thought it for the convenience of the public, to grant it.

I shall be glad to have your opinion as to whether (*a*) under the Licensing Act, 1953, the magistrates can grant an occasional licence on a day other than one fixed for petty sessional meetings and (*b*) whether the licensee can insist on the magistrates meeting specially. Section 64 of the Licensing Consolidation Act, 1910, sets out the preliminaries for the granting of a consent and there is a proviso added that consent may be given by any two justices if there is no sitting of a petty sessional court within three days before the time when the licence is required but there does not seem to be any similar proviso in s. 148 of the Licensing Act, 1953.

I shall be glad of your advice on these points. The reason for knowing whether to encourage such applications is that I have to make a special journey of about 18 miles each way and the magistrates about six miles, and the police have also to make a special journey.

I shall be glad also if you could advise whether consent to a special order of exemption can be granted at a court specially called for the purpose or whether this can be granted only on the days fixed for petty sessional courts, and whether the licensee could insist on a special meeting of the magistrates.

NARBOR.

Answer.

The law is silent on our correspondent's point. It is a matter which often arises in rural areas and, by reference to the needs of the area, it is usually dealt with by organization as goodwill and convenience make possible. A licence holder is entitled to apply to a magistrates' court and his right to do so cannot, in our opinion, be nullified by the court's refusal to sit: on the other hand, the court is entitled to stipulate for a reasonable length of notice and may say that it prefers to deal with applications of this kind at the monthly sittings of the court and not at intermediate sittings. It may be that the difficulties of travel could be overcome by the appointment of justices who live less than six miles from the court-house, and we think this a case where the attendance of the police might be dispensed with: probably, also, the clerk could insist upon being satisfied in advance of the application (even by putting the applicant to the trouble of calling at his office) that the application had in it no point of law which called for his advice, thereby making his own attendance unnecessary.

6.—Public Health Act, 1936—*Nuisance—Notice to unincorporated firm.*

Having read the answer to P.P. 9 at 117 J.P.N. 308, and the relevant sections of the Public Health Act, 1936, the Public Health (London) Act, 1936, and s. 183 of the London Government Act, 1939, it seems to me that only a local authority in the metropolis may serve a notice on a partnership or firm by serving such notice on the firm by its business name, and the notice is "deemed to be served on each partner" only when the service is in accordance with s. 183 of the London Government Act, 1939.

My council serve many abatement notices under s. 93 of the Public Health Act, 1936, on firms of estate agents, and I shall therefore appreciate your views on the following points:

(*a*) Is there any statutory provision corresponding to s. 183 of the London Government Act, 1939, regarding service of notices by local authorities outside the metropolitan area?

(*b*) If the answer to (*a*) is "no," can an abatement notice be served on a firm by its business name, and if so, in view of the provisions of s. 94 of the Act of 1936, which enables a complaint to be made to the justices to summon a person on whom an abatement notice has been served who has defaulted in complying therewith, can the subsequent complaint to the justices be framed to summon the firm, or must the name of each partner be specified in the complaint?

(*c*) If it is necessary to serve all partners with an abatement notice, can expense and office work be curtailed by sending a notice to the firm's office, but including the names of each and every partner on one notice, stating that they trade collectively under a particular style or title, or should an individual notice be made out and served on each partner in the firm?

ELLES.

Answer.

(*a*) No: we have however regarded the London enactment as (possibly) precautionary, rather than essential.

(*b*) We think so. Ordinary commercial documents such as an account rendered for goods supplied would be so addressed, and it could be argued that a document issued to a firm was in reality issued to each member. However, our earlier answer did recognize that where there was danger of having to proceed to a summons (which must be addressed to an individual) it might be prudent to start with notice to each partner, if known.

(*c*) We see no objection to the suggested course, though equally not much saving.

7.—Road Traffic Acts—*Lighting Regulations*, 1954—"*Fog lamps*" *on vehicles first registered after January* 1, 1952—*Use other than in fog or snow.*

A question which has arisen time and time again has once again caused considerable discussion here respecting the form of charge to prefer in respect of the use of lamps showing a light to the front of a vehicle to which regs. 9 and 10 of the Road Vehicles Lighting Regulations, 1954, apply—and which are fixed to the vehicle below the minimum heights as laid down in those regulations according to the date of registration of the vehicle—popularly known as foglamps or spotlamps. The matter seems to resolve itself into the answer to the question "Does one have to prove that a person was dazzled before an offence is committed by the user of a lamp fixed to a vehicle below the minimum height?"

One contention is that two offences can be committed by persons using such lamps:

(i) If the lamp dazzles a charge can be preferred under reg. 10 (2) (*a*). (This also applies, of course, to lamps fixed within the limits laid down in reg. 9.)

(ii) If the lamp fixed below the minimum height is used in clear weather an offence is committed against reg. 9.

The opponents of this argument say that reg. 9 does not make it an offence to use such a lamp, saying the proviso to reg. 10 (which regulation is governed by reg. 9) merely provides that a lamp, below the measurements stated, if used as stated above, shall not be held to comply with reg. 10 (2) (*a*). To illustrate their point, they say the offending lamp might be capable of being extinguished and one of the listed alternatives (*b*), (*c*) and (*d*), brought into being.

Those who do not agree with this say the regulation clearly says "No lamp . . . shall be *used* . . ." unless it complies with sub-para. (*a*). If the beam of light does not comply with sub-para. (*a*) then three alternatives are listed whereby the beam of light *is altered so that it does*. But, the proviso holds, a lamp fixed below the minimum heights, if used other than in conditions of fog or falling snow, does not comply with sub-para. (*a*) and therefore it is said cannot be made to do so by adopting any of the alternatives. It is therefore illegal in that it does not conform to reg. 9 (1) (*b*).

Should it be that a lamp—if fitted with a dipping device—can be used in clear weather even though it be below the regulation height, surely the reverse must apply, and a lamp fitted to a motor car *above* the height laid down in reg. 9 (1) (*a*) and capable of being dipped to conform with reg. 10 (2) (*a*) be legal?

J. KADUNA.

Answer.

Where reg. 9 applies we think that reg. 9 (1) (*b*), with s. 10, Road Transport Lighting Act, 1927, makes it an offence to show, except during conditions of snow and fog, a light from a lamp which does not comply with that regulation.

We do not think any offence is committed under reg. 10 (2), if the lamp can be deflected or extinguished so as to comply with reg. 10 (2) (*b*), (*c*) or (*d*). The requirements in this regulation are alternative ones, and the regulation is complied with if a lamp satisfies any one of them.

8.—Town and Country Planning Acts, 1947 to 1954—*Public Health (Buildings in Streets) Act*, 1888—*Movable structure.*

Following the erection of a kiosk for the sale of ice cream on a site immediately adjoining the footpath of a street, the council required application for their consent under the above-mentioned Acts to be made, such consent subsequently being refused by the council. The owner of the kiosk now proposes to convert it into a movable structure by placing it on a wheeled trolley, and he contends that as a movable structure it will not constitute development for which planning consent is required, and also that it will not be a building within the meaning of the Act of 1888. Your valued opinion is requested as to whether the owner is right in his contention.

ERREM.

Answer.

A genuinely movable contrivance is not a building or part, within the Act of 1888, but we think the owner is wrong about planning. It is not the structure itself that constitutes "development," but the use of the land. We are not told what was the previous use of the site and this is an element in deciding whether there has been a material change. A movable kiosk for purposes of trade in the garden of a house and in the forecourt of a shop might differ. The Minister has had a kiosk question for decision, but without knowing more we cannot say whether it is a useful precedent.

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